Supreme Court, U.S.
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In The

# Supreme Court of the United States

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DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, individually, and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents.

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On Petition to Invoke All Writs Jurisdiction
To The Supreme Court of the State of Florida

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. WHETHER THE RIGHT TO DEVISE PROPERTY IS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WHETHER THE DUE PROCESS CLAUSE REQUIRES A COURT TO PROVIDE A REASONED EXPLANATION FOR DEPRIVING A DECEDENT OF THEIR RIGHT TO DEVISE PROPERTY?

## PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

Delmy Safie, individually and as Personal Representative of the Estate of Alejandro T. Safie

Carlos Safie, individually

Executive Banking Corporation, a Florida corporation

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## BASIS FOR UNITED STATES SUPREME COURT JURISDICTION

On January 5, 2005, the Florida Supreme Court entered its final Order Denying Petitioner's Petition to Invoke All Writs Jurisdiction. By Order, no Petition for Rehearing was permitted, and none was filed. The statutory provision which Petitioner believes to confer jurisdiction in this Court to review on a Writ of Certiorari the judgment or Order below is 28 U.S.C. § 1257(a). In accordance with Rule 29(4)(c) of this Court, since 28 U.S.C. § 2403(b) may apply, notice is being provided to the Attorney General of the State of Florida.

## CONSTITUTIONAL PROVISIONS AND STATUTES IMPLICATED BY THIS PETITION

U.S.C. Const. Amend. XIV §1.

**Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement.**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. Art. V §3(b)(3)

(b) Jurisdiction. The Supreme Court ...:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

## STATEMENT OF THE CASE

This Petition for Certiorari challenges the decisions of two lower Florida Courts which, Petitioner says, deprived a decedent of his fundamental right to devise property in the manner set forth in his Last Will. The challenge is premised upon a denial of due process, both as to the deprivation of property rights and the flawed Florida appellate procedure which allowed that deprivation.

The lower courts declined to give reasoned opinions that justify this outcome or discuss the emerging modern trend on point which reaches a contrary result. Florida's Third District Court of Appeal, an intermediate appellate court, summarily disposed of the matter without written opinion by citation to two factually inapposite cases as though the point of law was well-settled.

Petitioner filed all motions available under Florida's appellate procedure to request a reasoned explanation that assured this result was not reached arbitrarily. In her Motion for Rehearing *En Banc*, Petitioner advised the Third District this result offended the decedent's right to devise property protected by the Florida constitution.[1] Again without comment, the intermediate appellate court denied any relief.

This Honorable Court has not yet decided whether the Fourteenth Amendment will protect the right to devise property. Hence, Petitioner was not at liberty to so argue below. However, in requesting the Florida Supreme Court invoke its "all writs" jurisdiction, Petitioner argued this Court has held "the total abrogation of the right to devise property is unprecedented and likely unconstitutional."

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[1] *Shriner's Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990). (the Florida constitution protects the right to devise property).

*Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2076, 2083 (1987). Petitioner also argued the lower courts failed to follow the authority they cite which mandates the Decedent's intent is paramount and controlling.

The Florida Supreme Court dismissed the Petition having determined it lacked jurisdiction to review a District Court decision issued without a written opinion. Thus, Petitioner is left with no explanation why the Decedent's clear testamentary intent established by compelling evidence and set forth in his last Will was not followed. This violated the decedent's right to due process under the Fourteenth Amendment to the United States Constitution as it is arbitrary and capricious.

In 1980, the decedent, Alejandro T. Safie, founded a bank known as Executive National Bank in Miami, Florida, a family institution of which the Decedent was President and Chairman. His eldest son, Respondent Carlos Safie ("Carlos"), acted as its Chief Executive Officer. The Decedent controlled the Bank through his ownership of 1,357 preferred shares of stock in the Bank's holding company. The shares were held in a Revocable Trust established by the Decedent as grantor in 1981 (the "Trust"). Under the Trust, the Decedent also acted as the sole Trustee. (*see Exhibit 1 to Appendix C,* incorporated herein by reference).

On March 23, 1999, believing the Trust terminated by its terms, the decedent executed a Will (the "1999 Will"). (*see Exhibit 2 to Appendix C,* incorporated herein by reference). The only specific devise provision of the 1999 Will declared: "At the time of the execution of this Will, I am the owner of 1,357 Preferred Shares of Executive Banking Corporation Stock...." Both the Trust and the 1999 Will provided that Carlos inherited a majority of the preferred shares and exclusive control of the Bank.

Six months before his death, the decedent revoked the 1999 Will by executing a new Will on November 29, 2001 (the "2001 Will"). His expressed purpose was to ensure his son, Carlos, did not inherit control of the Bank. The 2001 Will changed the specific devise provision of the 1999 will to provide Carlos should inherit only thirty (30%) percent of the preferred shares - not a majority. The majority of the 1,357 preferred shares were now devised to the decedent's wife and his other children. (*see Exhibit 3 to Appendix C,* incorporated herein by reference).

According to the unchallenged Affidavit of the attorney who drafted these wills, the decedent was vehemently upset with Carlos' performance as Chief Executive Officer of the Bank.[2] (*see Exhibit 4 to Appendix C,* incorporated herein by reference). The draftsman's affidavit states:

> Mr. Safie indicated to me that his intent was to completely change the specific devise with regard to the preferred shares of stock of Executive Banking Corporation. Mr. Safie specifically stated that he no longer wanted Carlos Safie to have the majority interest in the shares of stock because he was upset with how Carlos was handling the affairs of the Bank.

And further, in paragraph seven (7), he states:

> ... It was readily apparent that Mr. Safie was totally aware of the various terms and provisions of the Will and was intent on

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[2] Only months before, the Office of the Comptroller of the Currency found violations of federal banking regulations and forced the Bank into a Formal Written Agreement, under which it operated for some years.

radically changing the dispositive provisions of the previous Will.

Before his death, the decedent gave his wife, the Personal Representative under the 2001 Will, carefully sealed envelopes which contained the stock certificates for the preferred shares and the original 2001 Will. He instructed her to keep the envelopes in a safe deposit box until after his death.

In May of 2002, the decedent died. When the 2001 Will was published, Carlos produced a photocopy of the Trust agreement claiming it controlled. Carlos asserted the preferred shares remained held by the Trust in the absence of a writing to establish the decedent gave written notice of its revocation to himself, as Trustee.

The original Trust instrument was last known to be in the decedent's possession. Not surprisingly, the parties never found it among his belongings. A bank security guard testified the decedent ordered him to destroy bags of personal documents at the time he prepared the 2001 Will.

The Personal Representative sought a declaratory judgment that the 2001 Will should control disposition of the preferred shares. Cross-motions for Summary Judgment were filed. On May 1, 2003, the trial court granted Summary Judgment to Respondents citing the only Florida case to ever address conflicting provisions between a Revocable Trust and a later Will. *Euart v. Yoakley,* 456 So. 2d 1327, 1328 (Fla. 4th DCA 1984).

The trial court seemingly ignored the primary holding of *Euart* that the decedent's intention is the "polestar consideration" and controlling. *Id. at 1329.* The trial court found that although the decedent proposed to devise the preferred shares by his will, he simply could not upon the authority of *Euart.* The trial court found the

decedent never revoked Trust in strict conformity with its terms. (*see Appendix A,* incorporated herein by reference).

The trial court made no effort to reconcile the material factual differences between *Euart* and this case. In *Euart*, the decedent did not act as the sole Trustee of the Trust. *Id.*, at 1329. The decedent's intention was hotly contested in *Euart*. *Id.* at fn. 2. Yet, even in *Euart*, the Court conceded that a Will may constitute a writing sufficient to revoke a Trust where evidence shows that the"manifest intent" of the testator was for it to do so.

Respondents never challenged the Affidavit of the Wills' draftsman which clearly expressed the decedent's intent in preparing the 2001 Will. Moreover, after preparing the 1999 Will, the decedent told his accountant the Trust terminated by its terms in 1999. The decedent later told the Federal Reserve Bank of Atlanta he owned the preferred shares personally in a letter signed by his attorney and a senior executive officer and Secretary of the Bank holding company. The trial court declined to comment on any of this evidence.

The trial court summarily concluded that neither the 1999 Will nor the 2001 Will, whether read alone or together, demonstrate a revocation of the Trust. There was no explanation why the decedent proclaimed his ownership of the preferred shares in both the 1999 and 2001 Wills without reference to the Trust. Moreover, the trial court never reconciled why the 1999 Will distributed the preferred shares in the exact manner as the Trust if the decedent intended the Trust to remain viable.

On Appeal, Petitioner argued this was a case of first impression in Florida. Petitioner informed the Third District that a modern trend promulgated by the Uniform Trust Code and Restatement 3d of Trusts was presently emerging on this point. If adopted, the modern trend of

Trusts would find the Decedent's later Wills revoked the Trust.[3] Petitioner argued that Florida should join those states which recognize the absurdity of requiring a decedent to revoke a Trust by giving written notice himself, as Trustee.[4] Finally, Petitioner argued the Trust terminated by operation of the Merger Doctrine.

The Third District did not discuss these fully briefed arguments, never addressed by *Euart*, which remain unsettled in Florida. On March 17, 2004, the Third District issued a *per curiam* affirmance with citations to *Euart*,[5] ("citation PCA") as though the law was well settled and warranted no further discussion. To the contrary, *Euart* itself is a paradigm of the need for further inquiry. There, the dissenting opinion found, "[a]pplying the very authority cited by the majority I reach a contrary result." *Euart*, at 1330. Despite having a *de novo* standard of review, the Third District made no findings of the Decedent's intent (the "polestar consideration" under *Euart)* before arbitrarily issuing its citation PCA.

Petitioner requested all relief available under the Florida Rules of Appellate Procedure in moving for a written opinion, for rehearing, for rehearing *en banc*, and for certification that the issue was of great public

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3 *See, Restatement 3d of Trusts*, §63, Cmts. (h) and (i) (2003) and *Uniform Trust Code*, § 602(c) (2001).

4 *See, Barnette v. McNulty*, 516 P. 2d 583 (Ariz. App. Div. 2, 1974); *Sabin-Scheiber v. Sabin*, (340 N.W. 2d 114, 116) (MI 1983); *St. Louis Union Trust Co. v. Dudley*, 162 S.W. 2d 290, 294 (MO. App.1942); *Miller v. Exchange National Bank of Tulsa*, 80 P. 2d 209, 211 (OK 1938).

5 The Third District also cited *Macfarlane v. First National Bank of Miami*, (203 So. 2d 57 (Fla. 3d DCA 1967)), which holds a Trust must be revoked in strict conformity with its terms. *Macfarlane*, also cited by the *Euart* Court, does not address conflicting Will and Trust provisions.

importance. Petitioner argued a written opinion was necessary as *Euart* was factually inapposite and does not address these unique questions of first impression. Petitioner likewise argued that the law remained unsettled, warranting discussion beyond *Euart*. Only weeks after the Third District issued the citation PCA, the Supreme Court of Nebraska became the first state to formally adopt the modern trend of Trusts under a case which presented nearly identical facts.[6]

Petitioner also argued the Trust terminated by operation of law under the doctrine of merger; Respondents answered that the merger doctrine had been repealed. They were wrong as a matter of law. The Third District ignored the argument without comment. The authorities cited in the Third District's opinion never considered the point.

In seeking rehearing *en banc*, Petitioner's counsel certified this case was of exceptional importance as the decedent was denied his fundamental right to devise his property as protected by the Florida Constitution. Without explanation, the Third District summarily denied Petitioner all requested relief. (*see, Appendix B*, and incorporated herein by reference).

By refusing to give a reasoned explanation for its decision, the Third District denied the Florida Supreme Court jurisdiction to answer these questions of first impression. Under Article V of the Florida Constitution, as amended in 1980, the Florida Supreme Court has no jurisdiction to review the decision of a District Court that issues a citation PCA.[7] There are no set standards in Florida

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[6] *In re: Wendland - Reiner Trust*, 267 Neb. 696, 677 N.W. 117 (Neb. 2004).

[7] Florida Constitutional Amendment Article V 3(b)(3); *see generally, Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Ins. Co. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1981).

which require a District Court to write an opinion or certify the matter is of great public importance. In the most arbitrary manner, the Third District refused to explain how *Euart* is controlling, why a written opinion was not warranted, and how the denial of a protected property right was not a question of great public importance. As a result, the Third District shielded its decision from further review by the Florida Supreme Court and denied Petitioner due process of law.

Petitioner, nonetheless, implored the Florida Supreme Court to invoke its "all writs" jurisdiction in a final effort to obtain further review.[8] Petitioner argued below that this Honorable Court had found the abrogation of a decedent's right to devise property is likely unconstitutional.[9] She further argued, "after years of costly litigation, Petitioner remains in total darkness as to why the lower Courts summarily rejected her counsel's thoroughly briefed legal arguments to reach a result so clearly at odds with ... the 2001 Will."

Petitioner challenged the citation PCA as arbitrary and improper where it misapplied the law in an area that is unsettled. Under strikingly different facts, the three judges of the *Euart* Court are the only jurists in Florida to ever discuss issues similar to this appeal and they could not reach a unanimous decision.

Without addressing the merits of Petitioner's arguments, the Florida Supreme Court ruled that it lacked jurisdiction to review a citation PCA issued without a

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[8] *See,* Article V 3(b)(7), Fla. Const. and Fla. R. App. P. 9.030(a)(3).

[9] *Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2076, 2083 (1987).

written opinion.[10] The Florida Supreme Court dismissed the Personal Representative's Petition on January 6, 2005. This Petition follows.

## ARGUMENT

### I. A DECEDENT'S RIGHT TO DEVISE PROPERTY IS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Honorable Court instructs "the first inquiry in every due process challenge is whether the Petitioner has been deprived of a protected property interest." *American Manufacturers Mutual Ins. Co., v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 989 (1999). This Honorable Court has yet to formally declare the right to devise property is a protected property right. However, this Court has found the right to pass on property to one's heirs, and one's family in particular, is a valuable right that has been part of the Anglo-American legal system since feudal times. *Hodel v. Irving*, 481 U.S. 704, 715-6, 107 S.Ct. 2076, 2083 (1987). This Court likewise has found the "total abrogation of the right to devise property is unprecedented and likely unconstitutional." *Id.*

The Fourteenth Amendment of the United States Constitution protects life, liberty, and property from invasion by the states without due process of law. *U.S.C., Const. Amend. XIV.* It is well settled that this constitutional amendment protects the right to acquire, use and dispose of property. *Buchanan v. Warley*, 245 U.S. 60, 74, 38 S.Ct. 16, 18 (1917); *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972) (right to enjoy property without unlawful deprivation has long been

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10 Persaud v. State, 838 So. 2d 529, 533 (Fla. 2003).

recognized as a basic civil right). The Florida Supreme Court has held the right to devise property is a fundamental right protected by the Florida Constitution. *Shriner's Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990).

Respectfully, this Honorable Court should find the right to devise property is protected under the fourteenth amendment. While the decedent was alive, he enjoyed a constitutionally protected property right to deal with the preferred shares as he saw fit. Should the rule be any different in death? This Honorable Court should find the decedent's protected property interest in the 1,357 preferred shares granted him the right to order their disposal by his clear testamentary instructions. A right upon which the Courts may not arbitrarily impinge. As the Florida Supreme Court admonished, "courts should be reluctant to undo in death, what the testator in life sought to accomplish." *In re: Donnely's Estate*, 188 So. 108, 118 (Fla. 1938).

By enforcing the Trust over the 2001 Will, the lower Florida courts denied the decedent's right to dispose of his property as he saw fit. This result is arbitrary where the intermediate appellate court refused all requests for a reasoned written opinion that explains this result. Petitioner here argues that this arbitrary refusal offends due process. The absence of any standards for when the court is obliged to write an opinion underscores the constitutional infirmity.

## II. THE FLORIDA COURTS' REFUSAL TO PROVIDE A REASONED EXPLANATION FOR ITS DECISION DEPRIVED THE DECEDENT OF DUE PROCESS

### A. A Court Order Issued Without A Reasoned Explanation Is Arbitrary and Capricious

Once it is determined that a person's protected property interest was deprived, this Court must determine whether the State's procedures which caused this deprivation comport with due process. *American Mfrs. Mutual Ins. Co., v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 989 (1999). "It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *see also, Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1155 (1982) (the hallmark of property is an individual entitlement grounded in state law which cannot be removed except for cause).

A decade after ratification of the Fourteenth Amendment, this Honorable Court held that all state action does not comport with due process of law merely because the State declares it so. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). Any state action which simply declares in terms, without more, that title to property vested in "A" is hereby vested in "B" is a deprivation of due process within the meaning of the constitutional amendment. *Id.* The Due Process Clause protects against the arbitrary deprivation of property and reflects the high value our constitutional and political history place on a person's right to enjoy what is his, free of governmental interference. *Fuentes v. Shevin*, 407 U.S. 67, 80-1, 92 S.Ct. 1983, 1996 (1972).

Since the Magna Carta, the Due Process Clause has limited the powers of all branches of government, including the judiciary. *Truax v. Corrigan*, 257, U.S. 312,333, 42 S.Ct. 124, 129 (1921). "The vague contours of the Due Process Clause do not leave judges at large." *Rochin v. People of California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209 (1952). Judges have long been required to publicly give a reasoned opinion from the bench in support of their judgment. *Id.* at fn. 4. Arthur J. England Jr., Chief Justice Emeritus of the Florida Supreme Court recently noted: "[W]e expect judges, like no other public official, to justify their decisions with reason." Arthur J. England Jr., *Asking For a Written Opinion From a Court That Has Chosen Not To Write One*, 78-Mar Fla. B. J. 10, 14 (March 2004).

This Honorable Court may interfere with any state court judgment it finds to be arbitrary, capricious, or in conflict with fundamental principles protecting private rights. *American Ry. Express Co. v. Commonwealth of Kentucky*, 273 U.S. 269, 273, 47 S.Ct. 353, 355 (1927). In the context of substantive due process, the reason given to support state action which deprives property may not be so inadequate that it may be characterized as arbitrary. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974). State action is "arbitrary" when taken without reason or for merely pre-textual reasons. *Decarion v. Monroe County*, 853 F. Supp 1415, 1421 (S.D. Fla. 1994).

The "arbitrary and capricious" standard requires a State examine the relevant data and articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983) citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962). As the Florida Supreme Court noted, "one of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Roberson v. Florida*

*Parole and Probation Commission*, 444 So. 2d 917, 921 (Fla. 1983).

The Third District deprived the Decedent's property right in an arbitrary manner which prevented further review by the Florida Supreme Court. The Third District acted arbitrarily by refusing to issue findings, and a reasoned opinion based on those findings, before depriving the decedent of his property rights. Florida's appellate procedure encouraged this result by granting the Third District unfettered discretion to decide which of its decisions will be reviewed and which will not. As discussed below, the Florida Supreme Court lacks jurisdiction to review any district court decision issued without a written opinion. The district court can refuse to issue a written opinion for any reason or for no reason at all. This arbitrary result offends due process.

B. The Florida Appellate Procedure Offends Due Process as Applied to this Case

Given the procedural setting of the within case, this proceeding is Petitioner's first opportunity to raise the due process arguments advanced herein. Until rebuffed by the Florida Supreme Court, the application of the flawed Florida procedure which deprived Petitioner of her avenue of review by the state's highest court was not drawn into issue. It is the absence of standards and the inability for the Petitioner to be afforded consideration by the State's high court in an area of property rights and emerging trends of law that runs afoul of the concepts of due process in this case.

This Honorable Court has established the rule that, what might be generally considered a valid and legitimate exercise of state power, may be held constitutionally invalid when it operates to deprive an individual of a protected right. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct.

780, 787 (1971). Once a state has established avenues of appellate review, the avenues must be kept free of unreasoned distinctions that can only impede equal and open access to the courts. *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500 (1966). By refusing to explain its decision, the Third District denied Petitioner equal and open access to the Florida Supreme Court in contravention of due process.

This Honorable Court has identified three factors which normally determine whether an individual has received the process that the Constitution finds due. *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335, 903.

Only by weighing these concerns, can courts determine whether a state has met the fundamental requirement of due process. *City of Los Angeles v. David*, 538 U.S. 715, 717, 123 S.Ct. 1895, 1896 (2003).

1. "The private interest that will be affected by the official action;"

The first factor is satisfied here where, for reasons discussed at length, *infra.*, the lower Florida courts denied

the decedent's right to dispose of his 1,357 preferred shares as he saw fit, free from arbitrary government interference. The Third District dismissed the 2001 Will which purposefully and radically altered the disfavored estate plan expressed in both the 1999 Will and the Trust. The valid 2001 Will clearly provides Carlos should not inherit control of Executive National Bank as its redistributed the preferred shares to prevent this result. As the decedent's private interest in the preferred shares has been abrogated entirely, this Honorable Court should impose the highest protections available under the Fourteenth Amendment.

2. "The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;"

There is a high probability that this arbitrary denial of due process was preventable with additional safeguards that permit the Florida Supreme Court to exercise discretionary review of a citation PCA. In 1980, Article V of the Florida Constitution was amended to divest the Florida Supreme Court of jurisdiction to review a PCA without a written opinion.[11] Justice England, then Chief Justice of the Florida Supreme Court, noted this amendment was intended to "free the court from non-policy type of decisions and direct its efforts to issues of statewide importance or jurisprudential significance." England, Hunter, and Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev, 147, 200 (1980). Justice England forewarned that, in its new role as a limited policy-maker and law-harmonizer, the Supreme Court must remain vigilant not to "lose the mantle

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[11] Florida Constitutional Amendment Article V 3(b)(3); *see generally, Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Ins. Co. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1981).

of restrained supremacy which the amendment invites them to don." *Id.*

In 1993, the Honorable Judge Gerald B. Cope, Jr., of the Third District Court of Appeal, published an extensive article analyzing Florida's Appellate Procedure after the 1980 Amendment. Gerald B. Cope Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 Fla. L. Rev. 21 (Jan. 1993). Judge Cope concluded that Florida's written opinion requirement was enacted in a time of crisis and imposed "the most severe limitation on access to the State Supreme Court of any American jurisdiction." *Id.* at 93. This imposition was made under the "faulty premise" that a written opinion requirement was necessary to avoid successive appeals in every case. *Id.*

Florida's threshold requirement of a written opinion for Supreme Court jurisdiction has been subject to ardent criticism. Judge Cope argues this requirement is unsound as its permits review by the United States Supreme Court while depriving the Florida Supreme Court jurisdiction to review the same matter. *Id.* at 80. Judge Cope also notes the practice of issuing a PCA is entirely unregulated and inconsistently applied throughout the District Courts. *Id.* Moreover, Judge Cope observes that PCAs are routinely issued improperly to resolve cases that present debatable legal issues as evidenced by the dissenting and concurring opinions that often follow. *Id.*

Practitioners have also published articles that lament the arbitrariness of Florida's written opinion requirement. One attorney cited several examples where the District Court improvidently issued a PCA to "make it clear that the absence of an opinion is not synonymous with absence of significant legal issues. Powell and Maguire, *The PCA Debate – An Executive Overview*, 1 Fla. Coastal L.J. 67

(Spring/Summer 1999). Another attorney writes of attending a seminar where a Third District judge unabashedly told the audience, "we can run and we can hide" as no rule prohibits a district court from issuing a PCA for arbitrary reasons. Steven A. Been, *Letters*, 78-May Fla. B. J. 4 (2004).

In a passionate argument which contends that Florida's Appellate system is structurally defective, another attorney noted many instances where Florida District Courts issued a PCA without opinion which was later overturned by this Honorable Court, Federal Courts of Appeals, the Florida Supreme Court and other District Courts. Stephen Krosschell, *DCAs, PCAs, and Government In the Darkness*, 1 Fla. Coastal L. J. 13, 31-44 (Spring/Summer 1999).

Two decades after the 1980 amendment, the Florida Supreme Court commissioned a report to study the use of PCA decisions. *See*, Comm. on Per Curiam Affirmed Dec., Final Report and Recommendations (May 2000).[12] The majority reported that the PCA performs a useful function when used properly. *Id.* at 29. However, several practitioners on the committee criticized the ever increasing use of PCAs in their dissent to the final report. *Id.* at 40-53. They cite a widespread PCA problem which appears arbitrary and undermines the quality of appellate justice in Florida. *Id.* The Florida Supreme Court adopted the PCA Committee's recommendation to amend Rule 9.330 of Florida's Appellate Procedure to allow litigants to request a written opinion from the Court effective January, 2003.

Now in private practice, Justice England recently concluded this amendment to Rule 9.330 is also conceptually flawed and should be repealed. Arthur J. England, Jr., *Asking for Written Opinion from a Court That Has Chosen Not to Write One*, 78-Mar Fla. B. J. 10, 16

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12 www.flcourts.org/sct/sctdocs/library.html#reports

(March, 2004). Justice England recognized a procedural infirmity in that "asking a District Court to provide an opinion that will expose their rationale to Supreme Court review puts expressly in the hands of District Court judges the discretion to allow or not allow review." *Id.* at 15. Moreover, District Court judges lack the institutional experience needed to exercise this discretion expressly granted to the Supreme Court Justices by the Florida Constitution. *Id.*

It should be particularly vexing that the lower Florida courts refused to articulate a reasoned explanation for denying the Decedent's fundamental right to dispose of his 1,357 preferred shares by the 2001 Will. The Third District cannot arbitrarily justify this result by citation to authority that addressed factual situations materially at variance with the case under review. *Belcher v. Belcher,* 271 So. 2d 7, 13 fn. 16 (Fla. 1972); *Gibson v. Avis Rent-A-Car System, Inc.,* 386 So. 2d 520, 522 (Fla. 1980); *Acensio v. State,* 497 So. 2d 640, 641 (Fla. 1986). It is also "fundamental black letter law" in Florida that a citation PCA is improper unless "the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliot v. Elliot,* 648 So. 2d 137, 138 (Fla. 4th DCA 1994). This arbitrary result, and Florida's written opinion requirement which permits it, are repugnant to the Due Process Clause.

As recognized in *Euart*, the Third District's "polestar consideration" should be to accomplish the decedent's testamentary intent. The Third District gave no reasoned explanation to reconcile evidence that the decedent (1) prepared the 1999 Will believing the Trust no longer viable; and (2) spent weeks preparing the 2001 Will before his death. The Third District also ignored, without comment, the emerging trend set forth in the Restatement Third of Trusts § 63 (Cmts h & i) (2003) and the Uniform Trust Code §602(c)(2001) which would enforce the 2001

Will over the Trust. Petitioner informed the Court that the Supreme Court of Nebraska adopted the Restatement position weeks after the citation PCA to no avail.[13] The Third District arbitrarily declined to comment rather than expose its decision to violate the Decedent's protected property right to further review. Petitioner attributes no ill motive to the Third District. However, a system which permits even an appearance that a court has ruled arbitrarily offends that which is right.

As Judge Cope concludes, Florida's written opinion requirement runs counter to the ABA Standards, the experience of all other states, and the recommendations of the Supreme Court Commission on the Florida Appellate Structure. Cope, at 93-4. The Florida Supreme Court should have jurisdiction to review any case on the basis of importance, regardless of whether the District Court chose to write an opinion. *Id.* Alternatively, Florida's appellate procedure should adopt the California system which permits Supreme Court review where litigants have sought, but failed to obtain, a written opinion. *Id.*

This honorable Court should find Florida's written opinion requirement repugnant to the Due Process Clause as applied to this case which involves a protected property right and an unsettled area of law. This Court should require Florida adopt a procedural safeguard, with appropriate standards, which grants the Florida Supreme Court jurisdiction to review any case which presents a question of exceptional importance. Cases which may deprive a litigant of their constitutional rights are certainly of exceptional importance. *In the Interest of D.J.S.*, 563 So. 2d 655, 657 fn. 2 (Fla. 1st DCA 1990). Due Process mandates that state courts enforce protected property rights or provide a reasoned explanation for their deprivation.

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[13] *In re: Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W. 2d 117 (Neb. 2004).

Florida's written opinion requirement runs counter to that mandate. It encouraged the District Court to abuse its discretion to issue a PCA and arbitrarily deny the decedent's right to devise his property as he saw fit.

3. "The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Presently, Florida's appellate procedure requires that a motion for rehearing *en banc* contain a certification by counsel that case is of exceptional importance. Fla. R. App. P. 9.331. Judge Cope suggests that screening of petitions for exceptional importance will be much less arduous than screening for conflict jurisdiction as it will be "facially obvious whether the question presented is important or not." Cope, at 102. As a matter of policy, the Florida Supreme Court should continue to decline review of a citation PCA for conflict jurisdiction. However, the lack of a written opinion should only be a factor to considered in determining whether an important question is presented.

The government's paramount interest should favor the fair administration of justice in a manner that affords due process to all litigants. It is axiomatic that an excessive judicial workload necessarily hinders the government's ability to achieve this result in a timely manner. Petitioner does not suggest the Court should find due process requires a written opinion be rendered is each case. However, the courts of California, Texas, Ohio, Kentucky, Wisconsin and Washington are all required by statute or constitutional amendment to provide a written explanation for their

decision in each case.[14] The government's interest in managing the workload of the Florida Supreme Court should not truncate Petitioner's right to appellate review when constitutional rights are at stake. The increase to the Florida Supreme Court's workload will not be substantial if this Honorable Court mandates Judge Cope's recommendations. The Due Process Clause should not permit the Third District to shield its decision from further review by citation PCA.

Beyond notice and an opportunity to be heard, Due Process requires a Court provide a reasoned opinion for its decision. The Florida Supreme Court has a different judicial function than that of the intermediate courts of appeal.[15] Surely, in weighing the rights of litigants to have the State's highest court pronounce the state of the law in the area of disposition of property (an area of Constitutional protection), due process should prevail over a tenuous link to the laudable goal of attempting to manage the Supreme Court workload.

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[14] *See,* Cal. Const. art. 6, §14 (decisions of the Supreme Court and courts of appeal shall be in writing with reasons stated); Tex. R. App. P. 90(a) (written opinion must address every issue raised and necessary to final disposition of appeal); Ohio R. App. P. 12 (courts of appeal shall give reasons in writing for its decision); Ky. R. Civ. P. 76.28(1)(b) (opinions shall include an explanation of legal reasoning underlying the decision) Wis. Stat. Ann. §752.41(1) (West 1981) (court of appeal shall provide a written summary of reasons for the decision in each case); Wash. Rev. Code Ann. §2.06.040 (West 1988) (all decisions shall be in writing and state the grounds therefore).

[15] Justice England notes that only the justices have the institutional experience to determine if the time is propitious to exercise the Supreme Court's policy making responsibility. Arthur J. England Jr., *Asking For a Written Opinion From a Court That Has Chosen Not To Write One,* 78-Mar Fla. B. J. 10, 14 (March 2004).

## CONCLUSION

Petitioner believes that, in the within case, the decedent's obvious testamentary intent was not followed so as to deprive him of his right to dispose of his property as he saw fit. This arbitrary result offends due process which warrants the acceptance of jurisdiction and an Order that the parties brief their respective arguments. Petitioner so prays.

Respectfully submitted,

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Attorneys for Petitioner
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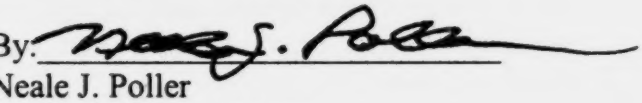
By: 
Neale J. Poller
Florida Bar No. 120329
Bruce Jacobs
Florida Bar No. 116203

(2)

No. 04-1336

In The

**Supreme Court of the United States**

---

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, individually and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents.

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On Petition to Invoke All Writs Jurisdiction
To The Supreme Court of the State of Florida

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# APPENDIX
# PETITION FOR WRIT OF CERTIORARI

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NEALE J. POLLER
Counsel of Record
BRUCE JACOBS
Camner, Lipsitz & Poller P.A.
550 Biltmore Way, Suite 700
Coral Gables, Florida 33134
(305) 442-4994

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 02-14282 CA 25

DELMY SAFIE, individually
and as Personal Representative
of the ESTATE OF ALEJANDRO
T. SAFIE,

Plaintiff(s),

vs.

CARLOS SAFIE and EXECUTIVE
BANKING CORPORATION, a
Florida corporation,

Defendant(s).

---

**ORDER ON DEFENDANT'S MOTION**
**FOR SUMMARY JUDGMENT**

**THIS CAUSE** having come on to be heard on Defendant's Motion for Summary Judgment and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon

**ORDERED AND ADJUDGED** that said Motion be, and the same is hereby **GRANTED.**

1. On August 18, 1981 Alejandro T. Safie created a revocable trust which holds the preferred shares of Executive Banking Commission ("EBC").

2. The terms of this revocable trust spells out specifically how this trust may be revoked. Specially, paragraph 10 states in pertinent part that:

> 10. The Grantor reserves the power at any time or from time to time during the time of his life to alter, amend or revoke in whole or in part the terms and provisions of the declaration of Trust and the Trusts hereby created, by an instrument in writing, mailed or delivered to the Trustee. In the event that the Grantor shall revoke this Trust, the Trustee shall pay over and transfer the Trust estate, including any accumulated income, or the portion thereof to which said revocation is applicable, to the Grantor or as the Grantor may direct in writing.
>
> Upon the death of the Grantor, this Declaration of Trust and the Trust hereby created shall be irrevocable.

3. At no time did Alejandro T. Safie act in accordance with the provisions of paragraph 10 in an effort to revoke this trust. He never revoked said trust in writing nor did he ever transfer the trust's assets to himself or to his designee.

4. Plaintiff's argue that Mr. Safie revoked this trust by a 1999 will and or by a will of 2001. They assert that even if he did not do so expressly, this was certainly his testamentary intent.

5. However, neither the 1999 will nor the 2001 will or both read together, demonstrate revocation of this trust.

Although the 1999 will proposes to devise the trust shares, it simply could not since these shares were pledged as collateral to City National Bank based upon a prior loan agreement.[1]

6. At the time of execution of the 2001 will, the obligation under the City National Bank loan had been satisfied.

7. Although Mr. Safie placed the stock certificates in a sealed envelope and invited his wife Delmy to deposit said envelope in a safety deposit box, the court finds that this, in and of itself, cannot constitute a revocation of the trust within its terms.

8. It should be noted that the stock certificates were never signed by Mr. Safie, and on occasions subsequent to the execution of the will he continued to vote at stock holder meetings as the owner of the shares of stock.

9. Under Florida law, if the method for the exercise of revocation is set forth in the trust agreement, then the power must be exercised in strict conformity to its terms. **Euart vs. Yoakley,** 456 So.2d 1327, 1328 (Fla.4th DCA 1984). Here, to be sure, there was no renunciation within the terms of this trust.

11. Therefore, since there is no genuine issue of material fact, summary judgment must be granted for the Defendants.

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[1] On September 11, 1998 Alejandro T. Safie in his capacity as Trustee pledged the trust shares to city National Bank as security for a $1.5 million dollar loan pursuant to a stock pledge and security agreement.

**DONE AND ORDERED** in Chambers at Miami-Dade County, Florida this 1st day of May, 2003.

/s/_____
**MICHAEL B. CHAVIES**
Circuit Court Judge

cc:
Norman J. Benford, Esq.
R. Lawrence Bonner, Esq.
Bruce Jacobs, Esq.
Paul M. Kade, Esq.
William Jay Palmer, Esq.
Neale J. Poller, Esq.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 02-14282 CA 25

DELMY SAFIE, individually
and as Personal Representative
of the ESTATE OF ALEJANDRO
T. SAFIE,

Plaintiff(s),

vs.

CARLOS SAFIE and EXECUTIVE
BANKING CORPORATION, a
Florida corporation,

Defendant(s).

---

**ORDER GRANTING DEFENDANTS' AMENDED MOTION TO CORRECT CLERICAL MISTAKES IN THE ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court on Defendants Carlos Safie and Executive Banking Corporation's Amended Motion to Correct Clerical Mistakes in this Court's Order granting Defendants' motion for summary judgment ("Summary Judgment Order"). Having reviewed the file, and being fully advised in the premises, it is hereby

ORDERED and ADJUDGED that Defendants' motion is granted and that paragraph 8 of the Court's Summary Judgment Order is replaced with the following: **It should be noted that Mr. Safie never endorsed and transferred the stock certificates to himself or to a**

**designee, and on occasions subsequent to the execution of the will he continued to vote at EBC shareholder meetings as the Trustee of the Revocable Trust rather than as an individual owner.**

In all other respects the Court's Summary Judgment Order stands as written.

**DONE AND ORDERED** in Chambers at Miami-Dade County, Florida this 6th day of June, 2003.

/s/_____
**MICHAEL B. CHAVIES**
Circuit Court Judge

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 02-14282 CA 25

DELMY SAFIE (Personal Representative)

Plaintiffs,

vs.

CARLOS SAFIE

Defendants.
_____/

**PLAINTIFF'S MOTION FOR REHEARING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court on April 30th, 2003 pursuant to Plaintiff's Motion for Rehearing of Defendant's Motion for Summary Judgment And Plaintiff's Cross-motion for Summary Judgment. The Court, after reviewing the record, having heard argument of counsel, having read the memoranda of law, and being otherwise fully advised, finds as follows:

1. On May 1st, 2003 this Court granted Summary Judgment for the Defendants on the basis that no genuine issue of material fact remained given the following:

   a. Mr. Alejandro T. Safie never revoked the trust in writing nor did he transfer the trust's assets to himself or to his designee.

b. Mr. Alejandro T. Safie's subsequent wills did not revoke the trust.

c. Mr. Alejandro T. Safie's act of placing his stock certificates in a sealed envelope and inviting his wife to deposit said envelope in a safety deposit box did not constitute a revocation of the trust.

d. Mr. Alejandro T. Safie did not act in conformity with the strict terms required for revoking the trust. The trust was not revoked.

2. Subsequent thereto, this Court heard argument in furtherance of Plaintiff's Motion for Rehearing.

a. Much of Plaintiff's argument was based upon the position that this Court erred in:

1. Its interpretation of Euart v. Yoakley, 456 So.2d, 1327 (Fla. 4th DCA 1984).

2. Misapplication of the summary judgment standard.

3. Defendants argued therefore, entitlement to a rehearing based upon the above.

4. This Court has exhaustively reviewed all of the motions, memoranda and transcripts filed in this case and based upon the foregoing makes the following determinations:

a. Under the Euart test, Alejandro T. Safie did not act in conformity with the strict terms required to revoke the trust.

b. With regard to the summary judgment standard, this Court finds that there is no genuine issue of material fact remaining in this cause, and thus would deny the Motion for Rehearing on that basis.

5. Rehearings are granted if the trial court overlooked matters when rendering its original decision. It is not a forum for re-arguing the issues. Diamond Cab. Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962).

6. This Court finds that it did not overlook matters when rendering its original decision nor did it predicate its order on incorrect legal arguments.

7. The Court remains firm in its decision that no genuine issue of material fact remains.

As such, Plaintiff's Motion for Rehearing of Defendant's Motion for Summary Judgment is DENIED.

Furthermore Plaintiff's Cross-motion For Summary Judgment is DENIED.

**DONE AND ORDERED** in Chambers at Miami-Dade County, Florida this 10 day of July2003.

/s/_____

**MICHAEL B. CHAVIES**
Circuit Court Judge

CC: All Counsel

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D., 2004

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Appellant,

vs.

CARLOS SAFIE, and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Appellees.

** CASE NO. 3D03-2226

Opinion filed March 17, 2004.

An Appeal from the Circuit Court for Miami-Dade County, Michael B. Chavies, Judge.

Camner, Lipsitz and Poller, and Neale J. Poller, and Bruce Jacobs; Kenny Nachwalter, and Scott E. Perwin, for appellant.

Shutts & Bowen, and William Jay Palmer, and Peter V. Fullerton, for appellee, Executive Banking Corporation.
Homer & Bonner and R. Lawrence Bonner for appellee, Carlos Safie.

Before GERSTEN, FLETCHER, and SHEPHERD, JJ.

PER CURIAM.

Affirmed. See Euart v. Yoakley, 456 So. 2d 1327 (Fla. 4th DCA 1984); MacFarlane v. First Nat'l Bank of Miami, 203 So. 2d 57 (Fla. 3d DCA 1967).

**M A N D A T E**
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

DCA # 3D03-2226

DELMY SAFIE, ETC.,
ET AL.,
v.
CARLOS SAFIE, ET AL.,

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this Court attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

Case No. 02-14282

WITNESS, The Honorable ALAN R. SCHWARTZ, Chief Judge of said

District Court and seal of said Court at Miami, this day October 8, 2004.

Seal of the Third District
Court of Appeal, State
Of Florida

/s/ Mary Cay Blanks
Clerk, District Court of Appeal,
Third District

CC W/O OPINION: Neale J. Poller and Bruce Jacobs; Kenny Nachwalter; Scott E. Perwin; William Jay Palmer and Peter V. Fullerton and R. Lawrence Bonner and Eric A. Hernandez

**SUPREME COURT OF FLORIDA**

THURSDAY, JANUARY 6, 2005

**CASE NO.**: SC04-2074

DELMY SAFIE, ETC. vs. CARLOS SAFIE, ET AL.

Petitioner(s) Respondent(s)

Having determined that this Court is without jurisdiction, this case is hereby dismissed. See Persaud v. State, 838 So. 2d 529 (Fla. 2003).

No motion for rehearing will be entertained by the Court.

A True Copy
Test:

/s/_____
Thomas D. Hall
Clerk, Supreme Court

Seal of the Supreme Court of the State of Florida

mc
Served:

BRUCE JACOBS
NEALE J. POLLER
R. LAWRENCE BONNER
CHRISTOPHER JOHN KING
PETER VAN DORN FULLERTON
WIILLIAM JAY PALMER

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2004

JUNE 23, 2004

DELMY SAFIE, ETC., ET AL.,
Appellant(s)/Petitioner(s),

CASE NO.: 3D03-2226

vs.

CARLOS SAFIE, ET AL.,
Appellee(s) /Respondent(s).

Upon consideration, appellant's request for a written opinion; motion for rehearing is hereby denied. GERSTEN, FLETCHER and SHEPHERD, JJ., concur. Appellant's motion for rehearing en banc is hereby denied. SCHWARTZ, C.J., and LEVY, GERSTEN, GODERICH, GREEN, FLETCHER, SHEVIN, RAMIREZ, WELLS and SHEPHERD, JJ., concur. COPE, J., recused.

Seal of the Third
District Court of Appeal
of the State of Florida

s/s Mary Cay Blanks
Clerk, District Court of
Appeal, Third District

cc:
Neale J. Poller
Scott E. Perwin
R. Lawrence Bonner
William J. Palmer
la

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2004

SEPTEMBER 22, 2004

DELMY SAFIE, ETC., ET AL.,
Appellant(s)/Petitioner(s),

CASE NO.: 3D03-2226

vs.

CARLOS SAFIE, ET AL.,
Appellee(s) /Respondent(s).

LOWER
TRIBUNAL NO. 02-14282

Upon consideration, appellant's motion to certify question as being of great public importance is hereby denied.

GERSTEN, FLETCHER and SHEPHERD, JJ., concur.

Seal of the Third
District Court of Appeal

/s/ Mary Cay Blanks
Clerk, District Court
of Appeal, Third District

cc:
Neale J. Poller
Scott E. Perwin
R. Lawrence Bonner
William J. Palmer

la

**APPENDIX C**
**EXHIBIT 1**

# TRUST AGREEMENT

ALEJANDRO T. SAFIE, GRANTOR

TO

ALEJANDRO T. SAFIE, TRUSTEE

Dated: August 18, 1981

Pryor, Cashman, Sherman & Flynn
410 Park Avenue
New York, NY 10022

TRUST AGREEMENT made as of the 18th day of August, 1981 between ALEJANDRO T. SAFIE, (hereinafter called the "Grantor"), and ALEJANDRO T. SAFIE, (hereinafter called the "Trustee").

1. The Grantor hereby transfers and delivers to the Trustee the property listed in Schedule A, hereto annexed, the receipt of which is hereby acknowledged by the Trustee, upon the express terms and conditions and with the powers and limitations hereinafter set forth. Additional property may from time to time be transferred by the Grantor or by any other person or persons to the Trustee with his consent, and such property shall thereupon become a part of the trust estate and shall be held, managed, invested, and reinvested, and disposed of on the same terms and conditions as the property originally transferred.

2. This Trust is revocable in accordance with Paragraph 10 and shall be known as the ALEJANDRO T. SAFIE Trust of August 18, 1981.

3. Until the death of the Grantor, the Trustee shall pay to or apply for the benefit of ALEJANDRO T. SAFIE, all of the net income of the Trust hereby created in quarterly or more frequent installments, in equal or unequal shares and in addition, so much or all of the principal of said Trust as said ALEJANDRO T. SAFIE may request.

4. Upon the death of the Grantor, the principal and accrued income of the Trust estate including any property to which the Trust is entitled, by reason of the Grantor's death, shall be disposed of in the following manner:

(a) The Trustee shall divide the Trust into two shares: Share "A" shall consist of fifty one percent (51%) of the trust estate to be held and administered for the benefit of CARLOS A. SAFIE; Share "B" shall consist of forty nine percent (49%) of the then trust estate to be held and administered for the benefit of ALEJANDRO MATIAS SAFIE. The

Grantor shall have the absolute right during his lifetime on notice to the Trustee to change the percentage of the trust estate to be allocated to each share or to eliminate or change the beneficiaries of each share.

(b) The Trustee shall pay over and distribute Share A to CARLOS A. SAFIE upon the death of the Grantor or if he should predecease the Grantor, the same shall be added to Share B.

(c) As to Share B, the Trustee shall pay over and distribute the one-third (1/3) of the then principal of the trust estate to ALEJANDRO MATIAS SAFIE when he attains the age of twenty-one (21) years, one-half of the then principal when he attains the age of twenty-five (25) years and the remainder of the then trust estate when he attains the age of twenty-eight (28) years. During the term of the Trust, the Trustee may in his discretion pay over or apply for the benefit of ALEJANDRO MATIAS SAFIE the current net income of the Trust. Any income not paid over or applied shall be added to the trust estate.

(d) When ALEJANDRO MATIAS SAFIE attains the age of 28 years, the trust shall terminate, and the entire trust estate as it shall then exist, both principal and income, shall be paid and distributed to him, free and discharged of all trust.

(e) If ALEJANDRO MATIAS SAFIE dies before he attains the age of 28 years this Trust shall terminate upon his death, and the entire trust estate as it shall then exist, both principal and income, shall be paid and distributed in equal shares, to the then male issue of the Grantor's daughters or if non, to the then issue of ALEJANDRO MATIAS SAFIE or if none, to

the then issue of the Grantor's daughters or if none, to the then issue of the Grantor.

(f) The Trustee may make payments for the benefit of ALEJANDRO MATIAS SAFIE directly to him, or to the guardian of his person or property, or to any other person deemed suitable to the Trustee.

5. In the administration of the Trust, the Trustee shall have the following powers, all of which shall be exercised in a fiduciary capacity, primarily in the interest of the beneficiary:

(a) To hold any or all of the trust estate in the form of investment in which received.

(b) To sell at public or private sale, to mortgage, create a security interest in, pledge, or hypothecate, or to exchange or lease (including lease for a period extending beyond the term of this Trust), any stocks, notes, securities, real estate, minerals, and other Trust property, upon such terms, cash or credit, or both, as he may deem advisable.

(c) To invest and reinvest the trust estate, without limitation to trust of fiduciary investments, in investments of any kind, real or personal, including, without limitation, stocks, bonds, notes, mortgages, lands, minerals, royalties, leaseholds, participations in partnerships, joint ventures, and other business enterprises.

(d) To construct, add to, repair, or demolish (in whole or in part) any improvements upon any trust property.

(e) To participate in any reorganization, consolidation, merger, or dissolution of any

corporation, the stocks, bonds, or other securities of which may be held at any time as part of the trust estate and to receive and continue to hold any property which may be allocated or distributed to him by reason of participation in any such reorganization, consolidation, merger, or dissolution.

(f) To make or hold investments or any part of the trust estate in common or undivided interests with other persons, corporations, or trusts.

(g) To demand, receive, receipt for, sue for, and collect any and all rights, money, properties, or claims to which this Trust may be entitled, and to compromise, settle, arbitrate, or abandon any claim or demand in favor of or against this Trust.

(h) To borrow funds for this Trust in such amounts and for such purposes as to them shall seem for the best interest of this Trust and the beneficiary thereof, and to purchase property on the credit of this Trust, and, in connection with such borrowing or such purchase, to execute and deliver promissory notes or other evidences of indebtedness of this Trust and to mortgage, create a security interest in, or pledge all or any part of the trust estate to secure payment of such indebtedness, and to repay such indebtedness out of the trust estate.

(I) To employ agents, legal counsel including a partnership of which Trustee is a member, brokers, and assistants, and to pay their fees and expenses, as they may deem necessary or advisable to carry out the provisions of this trust.

(j) To vote in person or by proxy any shares of stock which may form part of this trust.

(k) To lend money to any person or persons upon such terms, but with adequate interest and security, as they may deem advisable for the best interest of this trust and the beneficiary hereunder.

(l) To elect, appoint, and remove directors of any corporation, the stock of which shall constitute trust property, and to act as a director and officer of any such corporation.

(m) Generally, and without limitation by any specific enumeration herein, to manage, control, operate, convert, reconvert, invest, reinvest, sell, exchange, lease, mortgage, create a security interest in, pledge, pool, or otherwise encumber and deal with the property of this trust, for and in behalf of this trust and the beneficiary thereof, to the same extent and with the same powers that any individual would have in respect to his own property and funds.

(n) The Trustee may freely act under all or any of the powers by this Agreement given to him in all matters concerning this trust, after forming his judgment based upon all the circumstances of any particular situation as to the wisest and best course to pursue in the interest of this trust and the beneficiary hereunder, without the necessity of obtaining the consent or permission of any person interested therein, or the consent or approval of any court, and notwithstanding that he may also be acting individually, or as trustee of other trusts, or as agents for other persons or corporations interested in the same matters, or may be interested in connection with the same matters as shareholder, director, or otherwise, provided, however, that he shall exercise such powers at all times in a fiduciary capacity primarily in the interest of the beneficiary hereunder.

The powers herein granted to the Trustee shall be deemed to be supplementary to and not exclusive of the general powers of trustees pursuant to law, and shall include all powers necessary to carry the same into effect.

6. Notwithstanding anything herein contained to the contrary, no powers enumerated herein or accorded to Trustees generally pursuant to law shall be construed to enable the Grantor, or the Trustee, or any other persons to purchase, exchange, or otherwise deal with or dispose of the principal or income of the Trust for less than an adequate or full consideration in money or money's worth, or to enable the Grantor or the Trustee to borrow the principal or income of the Trust, directly or indirectly, without adequate interest or security. No person, other than the Trustee, shall have or exercise the power to vote or direct the voting of any stock or other securities of the Trust, to control the investment of the Trust, either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, or to reacquire or exchange any property of the Trust by substituting other property of an equivalent value.

7. The Grantor if living or, if not, the Trustee or his survivor or successor shall have the power at any time to designate a successor or Co-Trustee or Trustees, and such successor or Co-Trustee or Trustees shall have the same duties and powers as are assumed and conferred in this Agreement upon the Trustee, including the power in any successor to himself appoint a successor. Any appointment of a successor or Co-Trustee or Trustees shall be made in writing, shall be acknowledged, and shall state the time or the event when such appointment shall take effect, which shall not be less than forty-five (45) days after such notice. A copy of such appointment shall be delivered to the Grantor and the primary beneficiary or his natural or legal guardian.

The Grantor during his lifetime shall have the right to remove any Trustee then acting, by written notice delivered to such Trustee or to nominate and appoint a successor Trustee.

If no Trustee shall be qualified and acting as such, CARLOS A. SAFIE, is hereby designated as successor Trustee and if he shall not qualify or having qualified ceased to act, ARNOLD M. LEIBOWITZ of Miami, Florida is hereby designated as successor Trustee.

8. No bond or other security shall be required of the Trustee or of any successor Trustee.

9. Any direction or provision herein contained to the contrary, wherever in this Agreement the Trustee is authorized or directed to pay over the income or any part of the principal to a beneficiary who has not attained the age of majority under the laws of such beneficiary's domicile, or to apply the same for the care, education and support of such beneficiary, the Trustee is authorized in his sole and absolute discretion to accumulate said principal or income during the period of the beneficiary's minority, or to pay over the same to the legal or natural guardian of said beneficiary, or to pay it directly to said beneficiary, or by otherwise applying such income or principal for the care, education and support of such beneficiary, all without bond. The receipt of any person to whom payment shall be made pursuant to the preceding sentence shall be sufficient acquittance and discharge to the Trustee and he need not look to the application of such payments. For the purposes of this Paragraph and the Trust created herein, the "age of majority" shall be twenty-one (21) years unless prohibited under the laws of said beneficiary's domicile.

10. The Grantor reserves the pow4r at any time or from time to time during the time of his life to alter, amend or revoke in whole or in part the terms and provisions of this Declaration of Trust and the Trusts hereby created, by an

instrument in writing, mailed or delivered to the Trustee. In the event that the Grantor shall revoke this Trust, the Trustee shall pay over and transfer the Trust estate, including any accumulated income, or the portion thereof to which said revocation is applicable, to the Grantor or as the Grantor may direct in writing.

Upon the death of the Grantor, this Declaration of Trust and the Trusts hereby created shall be irrevocable.

11. The Trustee may render an accounting at any time to the primary beneficiary of the Trust created herein, and the written approval of such beneficiary (or of his natural or legal guardian if such beneficiary shall be minor) shall be final, binding, and conclusive upon all persons then or thereafter interested in the Trust. The Trustee may at any time render a judicial accounting of his proceedings.

Any successor Trustee may accept and rely upon any accounting statement by or on behalf of any predecessor Trustee hereunder and shall not be liable for having accepted and relied upon such accounting statement or representation if it is later proved to be incomplete, inaccurate or untrue.

12. Any Trustee acting hereunder may resign at any time by written notice to the Grantor, if living, or if not to his legal or personal representative, the nominated successor Trustee and to the primary beneficiary. If such primary beneficiary shall be a minor or under any legal disability such notice shall be given to his natural or legal guardian or legal representative. Such resignation shall take effect upon the date specified in such notice, but not less than forty-five (45) days after the mailing or delivery of such notice, and upon the date so specified, all duties of the Trustee so resigning shall case.

13. If any beneficiary under the Trusts created by this Agreement shall, in any manner, directly or indirectly, attempt to contest or oppose the validity of the said Trust or any part thereof, in any court or commence or prosecute any legal proceeding of any kind in any court to set aside or declare invalid the said Trust or any part thereof, then and in that event such beneficiary shall forfeit and case to have any right or interest whatsoever under said Trust, and in such event, the principal of the Trust and the income therefrom shall be disposed of in all respects as if such beneficiary had predeceased the Grantor.

14. All questions relating to the validity, construction and administration of this Trust shall be determined in accordance with the laws of the State of Florida.

15. The Trustee hereby accepts the Trust herein created.

16. The title, powers, duties, immunities and discretions herein conferred upon the Trustee shall continue after the termination of the Trust, until final distribution.

17. The interest of any beneficiary, primary or otherwise in the principal or income of the Trust created herein, shall not be subject to assignment, alienation, pledge, attachment, or claims of creditors and shall not otherwise be voluntarily or involuntarily alienated or encumbered by such beneficiary.

18. Should any of the provisions of this Trust fail or be held ineffectual or invalid for any reason, no other portion or provision of this Trust shall be invalidated, impaired or affected thereby, but the Trust shall be construed as if such invalid portion or provision had not been herein contained.

In Witness Whereof, the Grantor and the Trustee have executed this Agreement the day and year first above written.

/s/_____
Alejandro T. Safie, Grantor

/s/_____
Alejandro T. Safie, Trustee

STATE OF FLORIDA )
)ss.:
COUNTY OF DADE )

On the 18 day of August 1981, before me personally appeared ALEJANDRO T. SAFIE, to me known and known to me to the individual described in and who executed the attached instrument, and he duly acknowledged that he executed the same.

/s/_____
Carolyn M. Elliott
Notary Public
Notary Public State of Florida at Large
My Commission Expires July 28, 1985
Bonded Thur General Ins. Underwriters

# LAST WILL AND TESTAMENT
# OF
# ALEJANDRO T. SAFIE

I, ALEJANDRO T. SAFIE, a resident of and domiciled in Miami-Dade County, Florida, do hereby make, publish, and declare this instrument to be my Last Will and Testament, hereby revoking any and all Wills and Codicils I formerly may have made.

## ARTICLE I
## PAYMENT OF DEBTS AND EXPENSES

I direct that all debts which I am legally obligated to pay at the time of my death, my last illness and funeral expenses and costs of administration of my estate, including taxes, shall be paid as soon as practicable after my death.

## ARTICLE II
## FUNERAL ARRANGEMENTS

I direct my Personal Representatives at their discretion to make all necessary and appropriate funeral and burial arrangements. I desire that my funeral be conducted in a religiously appropriate manner.

## ARTICLE III
## TANGIBLE PERSONAL PROPERTY

A. I have prepared a written, signed and dated statement prior to my death which disposes of certain of my tangible personal property. I intend that the written statement,

/s/_____
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as it may read at the time of my death, be a legally binding disposition of the tangible personal property described in such written statement. In the event that my Personal Representatives are unable to locate such written signed statement within thirty (30) days after the probate of my Will, it shall be conclusively presumed that such written signed statement does not exist, regardless of whether such written signed statement is later found.

B. I give and bequeath all my jewelry, automobiles, clothing, and other personal effects, as well as all household goods I may own at the time of my death, which have not otherwise been disposed of by specific devise or by the aforesaid written statement, to my children who survive me in equal shares, to be distributed among them as they shall mutually agree within a period of ninety (90) days from the probate of my will, or in the absence of such agreement, as my Co-Personal Representatives, in their sole discretion, shall deem advisable making such distribution in as nearly equal shares as possible.

C. Any of such items distributed to a minor may be delivered to the person with whom the minor resides, or such other person as may have custody and control of the minor, without intervention of a guardian, and the receipt of any such person shall be full acquittance of may Personal Representative as to such distribution.

## ARTICLE IV
## SPECIFIC DEVISE

At the time of the execution of this Will, I am the owner of 1,357 shares of preferred stock in Executive

/s/_____
INITIALS

Banking Corporation, a bank holding corporation. Of the 1,357 shares of preferred stock, I give and bequeath the stock in the following manner:

A. To my son, CARLOS SAFIE, 692 shares, and if he does not survive me, then to his issue, per stirpes, and if none, then to my other son, ALEJANDRO MATIAS SAFIE.

B. To my son, ALEJANDRO MATIAS SAFIE, 665 shares, and if he does not survive me, then to his issue, per stirpes, and if none, then to my other son, CARLOS SAFIE.

C. It is my specific intent that any other stock, whether common or preferred, that I may own at the time of my death in Executive Banking Corporation, shall be distributed as follows:

1. To my son, CARLOS SAFIE, 51%, and if he does not survive me, then to his issue, per stirpes, and if none, then to my other son, ALEJANDRO MATIAS SAFIE.

2. To my son, ALEJANDRO MATIAS SAFIE, 49%, and if he does not survive me, then to my Wife, DELMY SAFIE and my remaining children who survive me, in equal shares.

## ARTICLE V
## RESIDUARY BEQUEST

All the rest and residue of my estate after payment of estate taxes, including all lapsed and void gifts, wheresoever situated and of whatsoever kind or nature, including all

/s/_____
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property which I may acquire or become entitled after the execution of this Will, I give and bequeath to my children, in equal shares, and if any of my children predecease me, then to his/her issue and if there is no issue of a predeceased child, then his/her share shall be distributed to my remaining children in equal shares.

## ARTICLE VI
## POST-NUPTIAL AGREEMENT

I make no other provisions for my wife, DELMY SAFIE, not because of any lack of affection or love for her, but because we have mutually waived our right to share in each other's estates by a duly executed agreement of such waiver entitled "CONVENIO POSNUPCIAL' dated August 11, 1983.

## ARTICLE VII
## JOINTLY HELD PROPERTY

If at the time of my death I am joint owner, co-owner or owner of any real estate, bank account or savings account in any commercial bank or savings institution, bond, or any security or instrument of indebtedness, which is registered or issued in my name and that of another person or persons as tenants by the entirety, as jointly tenants with right of survivorship, or which is payable to either co-owner or the survivor of them, then I give and bequeath all my right, title and interest in any such property to the surviving joint owner thereof. It is my intention and understanding that all right, title and interest in any such property will past to such surviving joint owner upon my death by operation of law, but I do nevertheless make these provisions in order to eliminate

/s/_____
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any question as to the right of any such surviving joint owner to succeed to the ownership of such property upon my death and to provide for the possibility that a true joint tenancy with a right of survivorship or an estate by the entire was not created during my lifetime. However, notwithstanding anything contained in this provision, it is my intention that any property included in my taxable estate by virtue of Internal Revenue Code Section 2040 shall bear its own share of any increase in estate taxes or penalties attributable to that property.

## ARTICLE VIII
## IN TERROREM CLAUSE

If any beneficiary hereunder shall contest the probate or validity of this Will or provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass as if such beneficiary predeceased me. If all of the residuary beneficiaries join in such contest or proceedings then such benefits shall pass to those persons (other than the persons joining in such contest) who are living at my death and who would have been my distributees had I died intestate and had the person or persons contesting my Will died immediately before me. Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all of the provisions of this Will and the provisions of this Item are an essential part of each and every benefit.

/s/_____
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## ARTICLE IX
## ENCUMBRANCES

Any property bequeathed or devised, either outright or in trust, subject to any mortgage, lien or other encumbrances, shall be taken by the trustee, legatee or devisee of such property subject to such mortgage, lien or other encumbrance.

## ARTICLE X
## SIMULTANEOUS DEATH OR COMMON DISASTER

If my wife and I should die in a common disaster or under such circumstances that the order of our deaths cannot be established by proof, it shall be conclusively presumed for all purposes of this Will that my wife survived me.

## ARTICLE XI
## FOREIGN BENEFICIARIES

If it appears to the satisfaction of my fiduciaries that any principal of my estate or any trust created hereunder shall become distributable to a person so situated that such person, by reason of any action whatever in any foreign government, would not have the benefit or use of control thereof or that such principal, or the income therefrom would, if then distributed to such person, be (a) subject to immediate confiscation, expropriation or other similar seizure by a foreign government, (b) required to be loaned to, or exchanged for the obligations of a foreign government or converted to a foreign currency, or © delivered to a foreign government or to anyone selected by or representing a foreign government, my fiduciaries may, in their sole and uncontrolled discretion, but shall not be required to, postpone

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such distribution to such person of all or any part or parts of the principal and income of such share until such time or times as in their judgment each such person would have the actual benefit, use and control thereof and in the meantime to hold, manage, invest and reinvest the same for the benefit and account of such person. The foregoing power of my fiduciaries to postpone distribution shall apply not only in the case of the person to whom a share of the principal of my estate hereunder shall become distributable as aforesaid, but also, in the case of the subsequent death of such person, shall extend and apply to those claiming under or through him or her. The word "foreign" means foreign to the United State of America. In carrying out the foregoing provisions of this Item, my fiduciaries may act or decline to act upon such evidence or information as they may deem appropriate, and every determination made by them in good faith shall be binding and conclusive. My fiduciaries shall have with respect to each such retained share all of the power and discretion had with respect to the Estate or trust, generally.

## ARTICLE XII
## POWERS OF PERSONAL REPRESENTATIVES

In addition to all of the powers and protection granted to them by applicable law and not in limitation of any common law or statutory authority, and without application to any court, my Personal Representatives and in their absolute discretion shall have the powers and responsibilities described below:

A. To acquire by purchase or otherwise, and retain, temporarily or permanently any kind of realty and personalty - - including stocks and unsecured obligations,

/s/_____
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undivided interests, interests in investment trusts and discretionary common trust funds - - all without diversification as to kind or amount, and with respect to the residue of my estate, whether or not productive of income.

B. To sell or otherwise dispose of realty or personalty, publicly or privately, wholly or partly on credit, execute contracts and grant options binding upon estate or trust assets.

C. To divide or distribute principal in kind or in money, or partly in each, or by way of undivided interest, even if shares be composed differently and for such purposes the valuations of my Personal Representatives shall be conclusive.

D. To determine whether or to what extent expenditures should be charged against principal or income and what other adjustments should be made between principal and income; provided, however, that such determination shall not conflict with the Florida Uniform Principal and Income Act as amended from time to time.

E. To employ accountants, attorneys, and such agents as they may deem advisable; pay reasonable compensation for their services and charge same to (or apportion same between) income and principal as they may deem proper.

F. To renew, assign, alter, extend, compromise, release, with or without consideration, or submit to arbitration, obligations or claims, including taxes, held by or asserted against them which affect estate or trust assets.

/s/_____
INITIALS

G. To hold property in the name of nominees.

H. To borrow money, and pledge or mortgage any property, for the payment of taxes, debts or expenses or any other purpose which in the opinion of my Personal Representatives will facilitate the administration of my estate or any trust created herein.

I. To lease for periods to begin presently or in the future, without regard to statutory restrictions on leasing and even though such period may extend beyond the term of any trust; erect or alter buildings or otherwise improve property, demolish buildings, grant easements and charges; plat and subdivide, and to do all such acts as they deem necessary or advisable to carry out any plan of improvement for any real property forming a part of my estate or any trust created herein.

J. To carry insurance against such risks and for such amounts and terms as they determine with mutual insurers or otherwise.

K. To join with my spouse in income tax returns for any period prior to my death, or consent to treat gifts made by my spouse prior to my death as being made one-half by me for the purpose of the United States or any state gift tax law, and to pay such amounts of tax, interest, and penalties as my Personal Representatives deem advisable, even though not attributable to my own income or gifts.

L. To borrow or lend money, or sell or purchase assets to ro from my spouse or her estate, at such rates of interest, or at such prices, and upon such terms and conditions

/s/_____
INITIALS

as they deem advisable without liability or responsibility for any loss or diminution of income or the principal of estate or a trust created herein.

## ARTICLE XIII
## APPOINTMENT OF PERSONAL REPRESENTATIVE

I appoint my son, CARLOS SAFIE, and my attorney, PAUL M. KADE, as the Co-Personal Representatives of my estate.

A. If Carlos Safie is unable or unwilling to serve or predeceases me, I appoint son, ALEJANDRO MATIAS SAFIE, as his alternate Personal Representative.

B. If Paul M. Kade is unable or unwilling to serve or predeceases me, I appoint my accountant, JAMES HORAN, as his alternate Personal Representative.

C. To the extent permitted by law, I direct that any powers and rights granted to my Personal Representatives may be exercised by them without posting any bond, without obtaining any order from or the approval of any court, without any notice to or consent of anyone and that my Co-Personal Representatives shall not be required to make any report to any court at any time for any purpose.

D. Any Co-Personal Representative appointed herein my delegate any or all of his powers, duties and discretions to any other Co-Personal Representative by an instrument in writing and revoke such delegation at will in the same manner.

/s/_____
INITIALS

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of March, 1999, Miami, Miami-Dade County, Florida.

/s/_____
ALEJANDRO T. SAFIE

THE FOREGOING INSTRUMENT, consisting of seven (7) typewritten pages, was signed, sealed and published and declared by ALEJANDRO T. SAFIE, Testator, to be his Last Will and Testament, in our presence and we, at her request and in his presence, and the presence of each other have hereunto subscribed our names as witnesses, this 1st day of March, 1999, at Miami, Miami-Dade County, Florida.

| | |
|---|---|
| /s/_____ | residing at 9300 S. Dadeland Blvd., |
| Paul M. Kade | Suite 408, Miami, Florida 33156 |
| /s/_____ | residing at 9300 S. Dadeland Blvd., |
| Maytee J. Gonzalez | Suite 408, Miami, Florida 33156 |
| _____ | residing at 9300 S. Dadeland Blvd., |
| | Suite 408, Miami, Florida 33156 |

STATE OF FLORIDA )
) ss:
COUNTY OF MIAMI-DADE )

WE, ALEJANDRO T. SAFIE, PAUL M. KADE, MAYTEE T. GONZALEZ, and _____, the Testator and the witnesses, respectively, whose names are signed to the attached and foregoing instrument, having been sworn, declared to the undersigned officer that the Testator in the presence of witnesses, signed the instrument as his Last Will and Testament, that he signed voluntarily and that each of the witnesses, in the presence of the Testator and in the presence of each other, signed the Will as a witness and to the best of the knowledge of each witness, the Testator was at the time eighteen (18) or more years of age, of sound mind and under no constraint or undue influence.

/s/_____
Testator
/s/_____
Witness
/s/_____
Witness

_____
Witness

SWORN TO SUBSCRIBED BEFORE ME by ALEJANDRO T. SAFIE, the Testator and by Paul M. Kade and Maytee J. Gonzalez, the witnesses, on this 1st day of March, 1999.

/s/_____
Notary Public State of Florida

Official Notary Seal
Maria Elena Parrilla
Commission Number: [illegible]
My Commission Expires:
Sept. 11, 2000

Personally known __x_ or produced identification ___
Type of identification produced:

**APPENDIX C**
**EXHIBIT 3**

# LAST WILL AND TESTAMENT
# OF
# ALEJANDRO T. SAFIE

I, ALEJANDRO T. SAFIE, a resident of and domiciled in Miami-Dade County, Florida, do hereby make, publish, and declare this instrument to be my Last Will and Testament, hereby revoking any and all Wills and Codicils I formerly may have made.

## ARTICLE I
## PAYMENT OF DEBTS AND EXPENSES

I direct that all debts which I am legally obligated to pay at the time of my death, my last illness and funeral expenses and costs of administration of my estate, including taxes, shall be paid as soon as practicable after my death.

## ARTICLE II
## FUNERAL ARRANGEMENTS

I direct my Personal Representatives at their discretion to make all necessary and appropriate funeral and burial arrangements. I desire that my funeral be conducted in a religiously appropriate manner.

## ARTICLE III
## TANGIBLE PERSONAL PROPERTY

A. I have prepared a written, signed and dated statement prior to my death which disposes of certain of my tangible personal property. I intend that the written statement,

/s/_____
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as it may read at the time of my death, be a legally binding disposition of the tangible personal property described in such written statement. In the event that my Personal Representatives are unable to locate such written signed statement within thirty (30) days after the probate of my Will, it shall be conclusively presumed that such written signed statement does not exist, regardless of whether such written signed statement is later found.

B. I give and bequeath all my jewelry, automobiles, clothing, coins and cameras I may own at the time of my death, which have not otherwise been disposed of by specific devise or by the aforesaid written statement, to my son, ALEJANDRO MATIAS SAFIE, and if ALEJANDRO MATIAS SAFIE predeceases me, to my remaining children who survive me in equal shares, to be distributed among them as they shall mutually agree within a period of ninety (90) days from the probate of my will, or in the absence of such agreement, as my Personal Representative in his/her sole discretion, shall deem advisable making such distribution in as nearly equal shares as possible.

## ARTICLE IV
## SPECIFIC DEVISE

At the time of the execution of this Will, I am the owner of 1,357 shares of preferred stock in Executive Banking Corporation, a bank holding corporation. Of the 1,357 shares of preferred stock, I give and bequeath the stock in the following manner:

A. To my son, CARLOS ALEJANDRO SAFIE, 402 shares, and if he does not survive me, then to his issue,

/s/_____
INITIALS

per stirpes, and if none, then to my other son, ALEJANDRO MATIAS SAFIE; and if ALEJANDRO MATIAS SAFIE predeceases me, then to his issue per stirpes, and if none, then to my wife DELMY SAFIE, and if DELMY SAFIE predeceases me, then to my daughters, MARIA MERCEDES LANUZA, MARIA CRISTINA AND TERESA DELMY SAFIE, in equal shares, and if any daughter predeceases me, then her share shall be distributed in accordance with Sections C, D, and F of this ARTICLE IV, respectively.

B. To my son, ALEJANDRO MATIAS SAFIE, 616 shares, and if he does not survive me, then to his issue, per stirpes, and if none, then to my wife, DELMY SAFIE, and if DELMY SAFIE predeceases me, then to my daughters, MARIA MERCEDES LANUZA, MARIA CRISTINA AND TERESA DELMY SAFIE, in equal shares, and if any daughter predeceases me, then her share shall be distributed in accordance with Sections C, D, and F, respectively.

C. To my daughter, MARIA MERCEDES LANUZA of Managua, Nicaragua, 113 shares, and if she does not survive me, then to her issue, per stirpes, and if none, to her husband ALBERTO LANUZA, however, if ALBERTO LANUZA is divorced from MARIA MERCEDES prior to my death or predeceases me, then to my son, CARLOS ALEJANDRO SAFIE, and if CARLOS ALEJANDRO SAFIE, predeceases me, then to my son, ALEJANDRO MATIAS SAFIE, and if ALEJANDRO MATIAS SAFIE predeceases me, then to his issue per stirpes, and if none, then to my wife, DELMY SAFIE, and if DELMY SAFIE predeceases me, then to my remaining daughters, MARIA CRISTINA BAHAIA and TERESA DELMY SAFIE, in equal shares, and if either daughter predeceases me, then her share

/s/_____
INITIALS

shall be distributed in accordance with Sections D and F of this ARTICLE IV, respectively.

D. To my daughter MARIA CRISTINA BAHAIA of San Pedro Sula, Honduras, 113 shares and if she does not survive me, to her issue, per stirpes, and if none, to her husband, JORGE BAHAIA, however, if JORGE BAHAIA is divorced from MARIA CRISTINA prior to my death or predeceases me, then to my son, CARLOS ALEJANDRO SAFIE, and if CARLOS ALEJANDRO SAFIE, predeceases me, then to my son, ALEJANDRO MATIAS SAFIE, and if ALEJANDRO MATIAS SAFIE predeceases me, then to his issue, per stirpes, and if none, then to my wife, DELMY SAFIE, and if DELMY SAFIE predeceases me then to my remaining daughters, MARIA MERCEDES LANUZA and TERESA DELMY SAFIE, in equal shares, and if any daughter predeceases me, then her share shall be distributed in accordance with Sections C and F of this ARTICLE IV, respectively.

E. To my wife, DELMY SAFIE, 113 shares, and if she predeceases me, then to my son, ALEJANDRO MATIAS SAFIE, and if he predeceases me, then to his issue, per stirpes, and if none, then to my daughters, MARIA MERCEDES LANUZA, MARIA CRISTINA MAHAIA and TERESA DELMY SAFIE, in equal shares, and if any daughter predeceases me, then her share shall be distributed in accordance with Sections C, D and F of this ARTICLE IV, respectively.

F. In the event my daughter TERESA DELMY SAFIE, is entitled to a distribution of any stock of Executive Banking corp and if she predeceases me, then her share shall

/s/_____
INITIALS

be distributed to my wife, DELMY SAFIE, and if DELMY SAFIE predeceases me, to my remaining daughters, MARIA MERCEDES LANUZA and MARIA CRISTINA BAHAIA, in equal shares, and if either daughter predeceases me, then her share shall be distributed in accordance with Sections C and D of this ARTICLE IV, respectively.

G. It is my specific intent that any other stock, whether common or preferred, that I may own at the time of my death in Executive Banking Corporation, shall be distributed to my son, ALEJANDRO MATIAS SAFIE, and if he does not survive me, then to my Wife, DELMY SAFIE, and if she predeceases me, then to my daughters, MARIA MERCEDES LANUZA, MARIA CRISTINA BAHAIA and TERESA DELMY SAFIE, in equal shares and if any daughter predeceases me, then her share shall be distributed in accordance with Sections C, D and F of this ARTICLE IV, respectively.

## ARTICLE V
## RESIDUARY BEQUEST

All the rest and residue of my estate after payment of estate taxes, including all lapsed and void gifts, wheresoever situated and of whatsoever kind or nature, including all property which I may acquire or become entitled after the execution of this Will, I give and bequeath to my children, in equal shares, and if any of my children predecease me, then to his/her issue and if there is no issue of a predeceased child, then his/her share shall be distributed to my remaining children in equal shares.

## ARTICLE VI

/s/_____
INITIALS



LAW OFFICES OF PAUL M. KADE - Dadeland Towers North - 9300 South Dadeland Boulevard - Suite 408 - Miami, Florida 33156-2719 - Tel.: (305) 670-6929

## JOINTLY HELD PROPERTY

If at the time of my death I am joint owner, co-owner or owner of any real estate, bank account or savings account in any commercial bank or savings institution, bond, or any security or instrument of indebtedness, which is registered or issued in my name and that of another person or persons as tenants by the entirety, as jointly tenants with right of survivorship, or which is payable to either co-owner or the survivor of them, then I give and bequeath all my right, title and interest in any such property to the surviving joint owner thereof. It is my intention and understanding that all right, title and interest in any such property will past to such surviving joint owner upon my death by operation of law, but I do nevertheless make these provisions in order to eliminate any question as to the right of any such surviving joint owner to succeed to the ownership of such property upon my death and to provide for the possibility that a true joint tenancy with a right of survivorship or an estate by the entire was not created during my lifetime. However, notwithstanding anything contained in this provision, it is my intention that any property included in my taxable estate by virtue of Internal Revenue Code Section 2040 shall bear its own share of any increase in estate taxes or penalties attributable to that property.

## ARTICLE VII
## IN TERROREM CLAUSE

If any beneficiary hereunder shall contest the probate or validity of this Will or provision thereof, or shall institute or join in (except as a party defendant) any proceeding to

/s/_____
INITIALS



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contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass as if such beneficiary predeceased me. If all of the residuary beneficiaries join in such contest or proceedings then such benefits shall pass to those persons (other than the persons joining in such contest) who are living at my death and who would have been my distributees had I died intestate and had the person or persons contesting my Will died immediately before me. Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all of the provisions of this Will and the provisions of this Item are an essential part of each and every benefit.

## ARTICLE VIII
## ENCUMBRANCES

Any property bequeathed or devised, either outright or in trust, subject to any mortgage, lien or other encumbrances, shall be taken by the trustee, legatee or devisee of such property subject to such mortgage, lien or other encumbrance.

## ARTICLE IX
## SIMULTANEOUS DEATH OR COMMON DISASTER

If my wife and I should die in a common disaster or under such circumstances that the order of our deaths cannot be established by proof, it shall be conclusively presumed for all purposes of this Will that my wife survived me.

/s/_____
INITIALS



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## ARTICLE X
## POWERS OF PERSONAL REPRESENTATIVES

In addition to all of the powers and protection granted to them by applicable law and not in limitation of any common law or statutory authority, and without application to any court, my Personal Representatives and in their absolute discretion shall have the powers and responsibilities described below:

A. To acquire by purchase or otherwise, and retain, temporarily or permanently any kind of realty and personalty - - including stocks and unsecured obligations, undivided interests, interests in investment trusts and discretionary common trust funds - - all without diversification as to kind or amount, and with respect to the residue of my estate, whether or not productive of income.

B. To sell or otherwise dispose of realty or personalty, publicly or privately, wholly or partly on credit, execute contracts and grant options binding upon estate or trust assets.

C. To divide or distribute principal in kind or in money, or partly in each, or by way of undivided interest, even if shares be composed differently and for such purposes the valuations of my Personal Representatives shall be conclusive.

D. To determine whether or to what extent expenditures should be charged against principal or income and what other adjustments should be made between principal and income; provided, however, that such determination shall

/s/_____
INITIALS

not conflict with the Florida Uniform Principal and Income Act as amended from time to time.

E. To employ accountants, attorneys, and such agents as they may deem advisable; pay reasonable compensation for their services and charge same to (or apportion same between) income and principal as they may deem proper.

F. To renew, assign, alter, extend, compromise, release, with or without consideration, or submit to arbitration, obligations or claims, including taxes, held by or asserted against them which affect estate or trust assets.

G. To hold property in the name of nominees.

H. To borrow money, and pledge or mortgage any property, for the payment of taxes, debts or expenses or any other purpose which in the opinion of my Personal Representatives will facilitate the administration of my estate or any trust created herein.

I. To lease for periods to begin presently or in the future, without regard to statutory restrictions on leasing and even though such period may extend beyond the term of any trust; erect or alter buildings or otherwise improve property, demolish buildings, grant easements and charges; plat and subdivide, and to do all such acts as they deem necessary or advisable to carry out any plan of improvement for any real property forming a part of my estate or any trust created herein.

/s/_____
INITIALS



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J. To carry insurance against such risks and for such amounts and terms as they determine with mutual insurers or otherwise.

K. To join with my spouse in income tax returns for any period prior to my death, or consent to treat gifts made by my spouse prior to my death as being made one-half by me for the purpose of the United States or any state gift tax law, and to pay such amounts of tax, interest, and penalties as my Personal Representatives deem advisable, even though not attributable to my own income or gifts.

L. To borrow or lend money, or sell or purchase assets to ro from my spouse or her estate, at such rates of interest, or at such prices, and upon such terms and conditions as they deem advisable without liability or responsibility for any loss or diminution of income or the principal of estate or a trust created herein.

## ARTICLE XI
## APPOINTMENT OF PERSONAL REPRESENTATIVE

I appoint my wife, DELMY SAFIE, as the Personal Representative of my estate.

A. If DELMY SAFIE is unable or unwilling to serve or predeceases me, I appoint my son, ALEJANDRO MATIAS SAFIE, as the alternate Personal Representative, and if ALEJANDRO MATIAS SAFIE is unable or unwilling to serve or predeceases me, I appoint my wife's cousin, ZULEYMA SAMOUR, as second alternate Personal Representative.

/s/_____
INITIALS



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B. In the event ZULEYMA SAMOUR is appointed as alternate Personal Representative, then I appoint my attorney, PAUL M. KADE as the Co-Personal Representative.

C. To the extent permitted by law, I direct that any powers and rights granted to my Personal Representatives may be exercised by them without posting any bond, without obtaining any order from or the approval of any court, without any notice to or consent of anyone and that my Personal Representative(s) shall not be required to make any report to any court at any time for any purpose.

D. Any Co-Personal Representative appointed herein my delegate any or ali of his powers, duties and discretions to any other Co-Personal Representative by an instrument in writing and revoke such delegation at will in the same manner.

E. None of my Personal Representatives shall be required to post a bond to ensure their faithful performance of their fiduciary duties.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29th day of November, 2001, Miami, Miami-Dade County, Florida.

/s/_____
ALEJANDRO T. SAFIE

THE FOREGOING INSTRUMENT, consisting of six (6) typewritten pages, was signed, sealed and published and declared by ALEJANDRO T. SAFIE, Testator, to be his Last Will and Testament, in our presence and we, at her request and in his presence, and the presence of each other have hereunto subscribed our names as witnesses, this 29 day of November, 2001, at Miami, Miami-Dade County, Florida.

/s/_____ residing at _____

/s/_____ residing at 11320 SW 132 Ct.
Miami, FL 33186

STATE OF FLORIDA )
) ss:
COUNTY OF MIAMI-DADE )

WE, ALEJANDRO T. SAFIE, PAUL M. KADE, and MATT WEINSTEIN, the Testator and the witnesses, respectively, whose names are signed to the attached and foregoing instrument, having been sworn, declared to the undersigned officer that the Testator in the presence of witnesses, signed the instrument as his Last Will and Testament, that he signed voluntarily and that each of the witnesses, in the presence of the Testator and in the presence of each other, signed the Will as a witness and to the best of the knowledge of each witness, the Testator was at the time eighteen (18) or more years of age, of sound mind and under no constraint or undue influence.

/s/_____
Testator
/s/_____
Witness
/s/_____
Witness

SWORN TO SUBSCRIBED BEFORE ME by ALEJANDRO T. SAFIE, the Testator and by Paul M. Kade and Matt Weinstein, the witnesses, on this 29 day of November, 2001.

/s/_____
Notary Public State of Florida
Desiree G. Williams
Print Notary Name

Official Notary Seal

Desiree Galletti Williams
My Commission CC 920878
Expires: March 21, 2004

Personally known ___ or produced identification _x_
Type of identification produced: Florida Driver's License

Official Seal
Circuit and County Courts
Dade County, Florida

STATE OF FLORIDA)
COUNTY OF DADE)
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office. WITNESS my hand and official Seal this Sep 16 2002.
Clerk, Circuit and County Courts
By: /s/ _____
Deputy Clerk
Alison Ainsley

In The
Supreme Court of the United States

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No.

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, individually and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents

---

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that three copies of the Petition for Writ of Certiorari were served by Federal Express this 1st day of April, 2005 upon:

R. Lawrence Bonner, Esq.
Homer Bonner & Delgado
a Professional Association
Attorneys for Carlos Safie
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Charles Crist, Esq.
Florida Attorney General
Attorney for the State of Florida
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The Capitol, PL-01
Tallahassee, FL 32399
(850) 245-0140

_____
Neale J. Poller

**APPENDIX C**
**EXHIBIT 4**

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

CASE NO. 02-14282 (CA 25)

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALJEANDRO T. SAFIE,

Plaintiff,

v.

CARLOS SAFIE and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Defendants.
_____/

**AFFIDAVIT OF PAUL M. KADE, ESQ.**

STATE OF FLORIDA )
)ss
COUNTY OF MIAMI-DADE )

**BEFORE ME**, the undersigned authority, personally appeared Paul M. Kade, Esq., who upon being duly sworn deposes and states as follows:

1. I have been an attorney licensed to practice law in the State of Florida since 1980 and I have personal knowledge as to the statements set forth herein.

/s/ initials

2. On or about February 11, 1999, Alejandro T. Safie met with me for the purpose of preparing a new last will and testament. At the time of this meeting, Mr. Safie gave me copies of his then current will dated July 25, 1988 as well as a post-nuptial agreement that he had entered into with his wife, Delmy Safie, on August 11, 1983.

3. At the time of our first meeting, Alejandro T. Safie was the Chairman and President of Executive National Bank. Mr. Safie stated that he was using my services, rather than the services of any attorneys who may have been associated with Executive National Bank, because of his desire to keep our relationship secret in general as well as to keep secret the fact that he was revising his will. Mr. Safie also indicated that there was much tension between his sons, Carlos Safie and Alejandro Matias Safie, which, again, was another reason why he wanted to keep our relationship and the revision of his will secret.

4. At the first meeting, Alejandro T. Safie indicated that his main asset consisted of 1,357 shares of preferred stock in Executive National Corporation. He also indicated that Carlos Safie and Alejandro Matias Safie each owned 2,000 shares of common stock of Executive National Corporation with the remaining ten (10) or so shares divided among the other directors of the corporation. At all times during our meeting, Mr. Safie indicated that he was the owner of 1,357 shares of preferred stock and never mentioned anything pertaining to the existence of a trust, in general, or a trust pertaining to that stock in particular. The 1988 Will made no reference to these Preferred Shares.

5. During the first meeting, it was discussed that Carlos Safie would be the Personal Representative of the estate and would receive 692 shares of the preferred stock. Alejandro Matias Safie would receive 665 of the preferred shares. This equates to Carlos receiving 51% and Alex

receiving 49% of the preferred shares stock. Mr. Safie also discussed that any other stock he may have owned in Executive Banking Corporation would thereafter be split so as to give Carlos Safie 51% and Alejandro Matias Safie 49%.

6. On October 18, 2001, I again met with Alejandro T. Safie for the purpose of drafting a completely new will. Mr. Safie indicated to me that his intent was to completely change the specific devises with regard to the preferred shares of stock of Executive Banking Corporation. Mr. Safie specifically stated that he no longer wanted Carlos Safie to have the majority interest in the shares of stock because he was upset with how Carlos was handling the affairs of the bank. Mr. Safie also wanted his wife, Delmy Safie, to replace Carlos as the Personal Representative of his estate.

7. After the second meeting, I thereafter forwarded the first draft of the will to Mr. Safie on October 31, 2001. We then met again on November 6, 2001 to go over various changes in substance as well as typographical/spelling errors in the draft. It was readily apparent that Mr. Safie was totally aware of the various terms and provisions of the will and was intent on radically changing the dispositive provisions of the previous will.

8. A second draft of the will was forwarded to Mr. Safie on November 27, 2001 and, thereafter, Mr. Safie came to my office to sign the will on November 29, 2001. At the time of the signing of the will, Mr. Safie acknowledged that he was aware of what the provisions would do and that he wanted the witnesses to be present during his signing of the will.

9. I was one of the witnesses of the November 29, 2001 will and I can attest to the fact that the witnesses signed in front of each other as well as in front of Alejandro

T. Safie and that Alejandro T. Safie signed the will in front of the two witnesses.

10. I was notified of Mr. Safie's death on May 7, 2002. The following week, I prepared documents to open the estate and arranged to meet with Mrs. Safie to execute the estate documents. On May 23, 2003, Mrs. Safie came to my office with a copy of the November 29, 2001 will and four large white envelopes she received from Mr. Safie prior to his death. The envelopes were sealed with Mr. Safie's signature across each seal.

11. I broke the seal for the envelope labeled, "1,357 Preferred Shares Executive Banking Corp." which contained the two stock certificates for the Preferred Shares identified on the label. The envelope contained no other documents and made no reference to a Revocable Trust Agreement.

FURTHER AFFIANT SAYETH NAUGHT

/s/_____
Paul M. Kade

SWORN TO AND SUBSCRIBED before me this 5th day of March, 2003.

NOTARY SEAL: /s/_____
NOTARY SIGNATURE

Desiree Galletti Williams
My Commission CC920878
Expires March 21, 2004

Personally known __X__ or produced identification _____

Type of identification produced _____

3

No. 04-1336

Supreme Court, U.S.
FILED
MAY 6 - 2005
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

*Petitioner,*

*v.*

CARLOS SAFIE, individually and EXECUTIVE BANKING CORPORATION, a Florida corporation,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

## BRIEF IN OPPOSITION FOR RESPONDENT CARLOS SAFIE

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## STATEMENT OF THE CASE

In her Petition for Certiorari, Petitioner asks this Court to get proactive in the law-making and policy-setting process of the State of Florida. Petitioner asks the Court first to re-write long-standing Florida case law governing the rules for revocation of trusts. Petitioner asks the Court second to reconstitute Florida's appellate court structure and, in the process, cast aside decades of debate, state constitutional provisions and amendments, and a rule of appellate procedure. Petitioner clothes her requests in terms of Due Process, but she has no claim that any state constitutional amendment, law, or appellate rule is unconstitutional. Rather, Petitioner argues that Florida's trust law is out of step with an alleged "modern trend," and its appellate court system is supposedly "defective." Petitioner has nominated this Court to fix Florida's trust law and court system. But these issues are singularly within the province of the State of Florida, and this Court has no basis for getting involved.

This case is an uncomplicated trust challenge. Alejandro T. Safie established a revocable *inter vivos* Trust in 1981. Mr. Safie was, during his lifetime, the Trustee. The Trust named Respondent Carlos Safie the successor Trustee. The *res* of the Trust consisted of shares in a bank Mr. Safie had founded and controlled. Under the Trust, the bank shares were to be distributed to Mr. Safie's two sons, with the older son, Respondent Carlos Safie, receiving 51% and Carlos's younger half-brother, Alejandro Matias Safie, receiving 49%. Petitioner is Mr. Safie's second wife and personal representative, as well as the mother of Alejandro Matias Safie (but not of Carlos Safie). After Alejandro T. Safie died, Petitioner brought an action in Miami-Dade County, Florida Circuit Court to declare the Trust revoked or modified.

Petitioner's principal evidence was a will that distributed the bank shares differently than the Trust. The will gave Petitioner shares and reduced the sons' percentage interests. The will effectively shifted controlling interest in the bank from Carlos Safie to Petitioner and her son, Alejandro Matias Safie.

On Respondents' summary judgment motion, the trial court found that the Trust had not been revoked according to its express terms and therefore the Trust controlled over the will. The Court specifically relied on *Euart v. Yoakley*, 456 So. 2d 1327, 1328 (Fla. 4th DCA 1984), which holds that a will can revoke a trust only where the trust has been revoked in strict conformity with its terms of revocation and the will clearly manifests an intent to revoke. The *Euart* court had in turn relied on *MacFarlane v. First National Bank of Miami*, 203 So. 2d 57, 60 (Fla. 3d DCA 1967), which set forth the "strict conformity" requirement for revocation based on general trust law that "a valid trust, once created, cannot be revoked or altered except by a reserved power to do so."

Petitioner complains in her Petition that "the lower courts declined to give reasoned opinions that justified its outcome," that "Petitioner is left with no explanation why the decedent's [supposedly] clear testamentary intent . . . was not followed," and that she remains in "total darkness" as to why her arguments were rejected. In fact, the trial court explained its ruling in a separate written order granting summary judgment, a second time in another written order correcting clerical mistakes, and a third time in an written order denying Petitioner's motion for rehearing.[1] The three written orders

[1] The three written orders are attached as "Appendix A" to Petitioner's Writ of Certiorari Petition.

together include multiple paragraphs of findings that the Trust had not been revoked and a conclusion of law based on *Euart* and *MacFarlane*.

Florida's Third District Court of Appeal *per curiam* affirmed ("PCA") the trial court's ruling with cites to *Euart* and *MacFarlane*. Petitioner asked for rehearing and a written opinion under Florida Rule of Appellate Procedure 9.330(a), which the Third DCA rejected. Then, in an effort to circumvent a Florida constitutional provision that eliminates supreme court review of PCA decisions,[2] Petitioner asked the supreme court to invoke its All Writs jurisdiction under Art. V, § 3(b)(7) of the Florida Constitution. The supreme court denied that petition. Petitioner charges now that the Third DCA has refused to explain how *Euart* is controlling. But the PCA reinforces what every court reviewing this case has understood – that a mechanical application of *Euart* to the trial court's finding that the Trust had not been revoked entirely resolves the case. Petitioner's claim that *Euart* remains "unsettled in Florida" is unaccountable, and Petitioner's professed ignorance is either a stubborn refusal to admit legal defeat or a matter of willful blindness.

Petitioner includes in her petition several red herrings. Petitioner continues to argue that a supposed "modern trend" in trust law, which apparently calls for indeterminate inquiries into the intentions of decedents, should replace the certainty of the "strict conformity" revocation requirements of *Euart* and *MacFarlane*. According to Petitioner, this "modern trend" has been adopted by all of one State, Nebraska. In fact, the Nebraska case Petitioner relies on, *In re: Wendland-Reiner Trust*, 677 N.W. 117 (Neb. 2004), has nothing to do

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[2] Art. V, § 3(b)(3) Fla. Const.

with whether a will can revoke trust. *Wendland* is a fact-specific case where the issue was whether a letter from the trustee sufficed to amend the trust in question under the particular amendment requirements in the agreement. The cite to *Wendland* is in any case irrelevant to the extent Florida has rejected any approach different from its long-standing precedent in *Euart*.[3]

Petitioner also references in her petition the so-called "merger doctrine," which once could have been used to argue against the validity of trusts where the settlor also acted as trustee. But this doctrine was superseded twenty-five years ago by a Florida Statute, § 689.075(1)(g), which expressly provides that *inter vivos* trusts "shall not be held invalid . . . because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee." Petitioner contends that Respondents' reliance on the plain language of § 689.075(1)(g) is "wrong as a matter of law." However, Petitioner has nothing meaningful to back up her statement, and that explains why Florida's Third DCA did not waste its time writing about the "merger doctrine."

Petitioner's Statement of the Case suggests no basis for certiorari review.

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[3] Petitioner also continues to expound on Alejandro T. Safie's alleged "clear testamentary intent." Petitioner claims that an affidavit by the alleged "draftsman" of the later will drawing supposed conclusions about Mr. Safie's intent went "unchallenged." That affidavit has never been anything more than a series of unproven allegations, which Respondents at no point in the underlying proceedings admitted. As it turned out, this "draftsman" did not even know about the existence of the Trust. Petitioner has no finding or adjudication regarding Mr. Safie's intentions because the issue was moot. Since the trial court found that the Trust had not been revoked, it was unnecessary to get into the vagaries of what Alejandro T. Safie intended by his will.

## REASONS FOR DENYING THE PETITION

### I. THE RIGHT TO DEVISE PROPERTY UNDER THE FOURTEENTH AMENDMENT IS A NON-ISSUE

Petitioner claims the first issue for review is whether "a decedent's right to devise property is protected by the Fourteenth Amendment of the United States Constitution." Respondent Carlos Safie has never denied that the decedent in this case, Alejandro T. Safie, had the right to devise property. Indeed, as Trustee, Carlos Safie is bound in defense of the Trust to argue in favor of that right. The issue as Petitioner has framed it therefore presents no case or controversy.

The real controversy lies in Petitioner's assumption that a will is the only vehicle for devising property. In fact, the law recognizes many such mechanisms. In Florida, an *inter vivos* trust is expressly recognized and legislated by the Florida Statutes as a mechanism for devising property. *See* § 689.075, Fla. Stat. The issue facing the trial court in this case was what to do where a will has terms inconsistent with a revocable trust. Florida, like every State in the Union, has case law addressing just this issue, and that is *Euart*, 456 So. 2d at 1328.

It is well settled that questions involving property, trust, and probate are areas of traditional, and important, state concern. *See, e.g., Boggs v. Boggs*, 520 U.S. 833, 861 (1997), (Breyer, J., dissenting) (arguing that Louisiana state law was not preempted by ERISA in part because "the state law in question involves family, property, and probate – all areas of traditional and important, state concern") (citations omitted); *Zschernig v. Miller*, 386 U.S. 421, 440 (1968) (noting that

"the several States, of course, have traditionally regulated the descent and distribution of estates"). There is, in this case, no federal statute like ERISA or threat to the nation's foreign policy (as in *Zschernig*) that might compel this Court to interfere with Florida's authority to decide trust and probate issues. Florida thus has every right to establish laws controlling trusts and wills. Petitioner's apparent disagreement with *Euart* has nothing to do with any legitimate Due Process concerns. Accordingly, this Court has no basis for certiorari review of Florida's law on trusts and wills as announced in *Euart*.

## II. THE PER CURIAM AFFIRMANCE IN THIS CASE DEPRIVED PETITIONER OF NO DUE PROCESS RIGHTS

There is no recognized Due Process right animated by a written opinion itself. By the end of the appeal, the trial court has ruled and made some pronouncement on the ruling (in this case, the trial court announced and confirmed its ruling in three written orders), the issues have been briefed before the appellate court, oral argument has usually been held, there has been colloquy with the panel (as happened in this case), and the basis for the PCA should be readily apparent. Where the party is at the end of the appellate road, Due Process does not require a written explanation why the appealing party has lost again.

Petitioner does not go so far as to claim that PCA decisions are, in of themselves, unconstitutional. This Court itself has utilized PCAs many times. *See, e.g., Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002) (per curiam affirmed by "an evenly divided court"); *Free v. Abbott Laboratories*, 529 U.S. 333 (2000) (same); *Nat'l Motor Freight Traffic Association, Inc. v. United States*,

371 U.S. 223 (1962) (holding, per curiam, that "the motions to affirm are granted and the judgment is affirmed"); *Gordon v. State of Texas*, 355 U.S. 369 (1958) (affirming per curiam with cites to the "Twenty First Amendment of the Constitution of the United States" and *Carter v. Virginia*, 321 U.S. 131 (1944)); *Bailey v. Richardson*, 341 U.S. 918 (1951) (per curiam affirmed by an "equally divided court"); *Frost v. Corporation Commission of the State of Oklahoma*, 274 U.S. 719 (1927) (affirming per curiam "on the authority of *Chicago Great Western Railway Co. v. Kendall*, 266 U.S. 94, 100, 45 S. Ct. 55, 69 L. Ed. 183"). Instead, Petitioner attempts to connect her supposed Due Process argument to discussions about the duties of judges to announce reasoned opinions, typically for purposes of public accountability and instilling confidence that judges are doing their job. (The trial court in this case wholly satisfied that duty by its three written orders). These duties do not embody rights, but are matters of public policy that can be weighed against important interests in judicial economy, managing over-burdened dockets, and bringing finality to cases, all of which commend PCAs.

Due Process also does not guarantee multiple layers of appeal. Petitioner argues that the lack of a written opinion is depriving her of a right to appeal in the Supreme Court of Florida. But in Florida, an appeal in the district court of appeal is the *only* level of appeal as of right for civil litigants. The Supreme Court of Florida has underscored this point:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level [in 1956] was prompted by the great volume of cases reaching

> the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

*See Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958)[4]; *see also* Arthur J. England, Jr., *Asking For Written Opinion From The Court That Has Chosen Not To Write One*, 78 Mar. Fla. B.J. 10, 10 (March 2004) (explaining that "our district courts were created in 1956 with the express intention that they be final with respect to appeals as of right in Florida"). The PCA in this case therefore deprived Petitioner of no appellate rights.

Notwithstanding Florida's appellate structure, which strictly circumscribes the supreme court's jurisdiction, complaints arose among lawyers and jurists in Florida that PCAs were not being used as they were intended (and as it was properly used in this case) for easy cases where an established rule of law applies to a set of facts, but for controversial cases as well. In response, an extra layer of protection was added for litigants in Florida. Under Florida Rule of Appellate Procedure 9.330(a), adopted in 2002, a

[4] These same concerns addressed in *Ansin* about unmanageable supreme court case-loads and bringing finality to district court of appeal decisions led, over twenty years later, to Florida's constitutional amendment eliminating supreme court jurisdiction over PCAs. *See Jenkins v. State*, 385 So. 2d 1356, 1358-59 (Fla. 1980).

party can petition the district court of appeal for a written opinion in those cases where the party legitimately believes a written opinion will "provide a legitimate basis for Supreme Court review." Much of Petitioner's argument is directed toward this rule, which, as Petitioner acknowledges, was the result of passionate debate on both sides. Petitioner, who sought relief in this case under Rule 9.330(a) and lost, posits the "passionate argument" against the Rule, but gives short shrift to the other side, and in fact misrepresents that side. Petitioner cites to an article from former Supreme Court of Florida Chief Justice Arthur England in which Justice England writes that Rule 9.330(a) is conceptually flawed and should be repealed. Petitioner conveniently omits Justice England's point that no rule qualifying the constitutional elimination of supreme court jurisdiction over PCAs is necessary.[5] Indeed, it was Justice England who, in the interests of finality and substantially limiting appellate traffic in the Supreme Court of Florida, championed the 1980 state constitutional amendment eliminating supreme court review of PCAs. *See* England, *Asking For a Written Opinion*, 78 Mar. Fla. B.J. at 10, 12.

What is at stake in this debate is not, as Petitioner claims, Fourteenth Amendment Due Process rights, but rather how

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[5] Justice England, a "regular appellate practitioner," wrote that he "considers himself able to determine a court's reasoning for a decision from briefs and colloquy in oral argument." England, *Asking For a Written Opinion*, 78 Mar. Fla. B.J. at 14. Justice England's call for repeal of Rule 9.330(a), Fla. R. App. P., was based on the untenable position appellate lawyers were placed in having to ask for a written opinion at the same time as asking for a motion for rehearing. *See id.* at 14-16.

best to manage Florida's appellate court system. This Court has made clear what its role is in these kinds of debates:

> It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the *finality and effect of their decisions* provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress.
>
> We might go still further, and say, with undoubted truth, that *there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory.*

*Missouri v. Lewis*, 101 U.S. 22, 30-31 (1879) (emphasis added); *see also North v. C.B. Russell*, 427 U.S. 328, 338-39 (1976) (citing *Missouri v. Lewis* and holding that a two-tier trial court system in Kentucky violated neither the due process nor equal protection guarantees of the Constitution).

Here, Petitioner does not argue that Florida's constitutional elimination of supreme court review of PCAs violates the Due Process Clause (nor could she), and Petitioner plainly has no argument that Florida Rule of Appellate Procedure 9.330(a) is somehow unconstitutional since it gives litigants more process than they are entitled.

Rather, Petitioner argues that Florida's appellate system is "structurally defective" and asks this Court to provide a remedy: "This Court should require Florida [to] adopt a procedural safeguard, with appropriate standards, which grants the Supreme Court of Florida jurisdiction to review any case which presents the question of exceptional importance." Petition for Writ of Certiorari at 19. This would radically change Florida's appellate court structure under its state constitution, and that is way beyond the authority of this, or any other, federal court.

## CONCLUSION

Accordingly, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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(4)

In The

# Supreme Court of the United States

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No. 04-1336

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents

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On Petition to Invoke All Writs Jurisdiction
To The Supreme Court of the State of Florida

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## REPLY BRIEF OF PETITIONER DELMY SAFIE

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## REPLY ARGUMENT

### I. TO IGNORE TESTAMENTARY INTENT IS TO DENY A PROTECTED PROPERTY RIGHT

#### A. The Decedent's Intent Is Not A "Moot" Issue

Of the Respondents in this case, only Carlos Safie writes to oppose the Petition for Writ of Certiorari.

Carlos concedes the Fourteenth Amendment to the United States Constitution should protect his father's right to devise property. That right is not honored in the breach, when a Court prefers an intent expressed in a decades old trust over that in a Will executed a mere six months prior to the Decedent's demise.

Petitioner respectfully suggests this Honorable Court should declare the right to devise property is constitutionally protected. It is a total abrogation of that right for a Court to refuse to adjudicate and enforce a decedent's clear testamentary intent.

Respondent postulates that the lower Florida courts deemed it "unnecessary to get into the vagaries of what Alejandro T. Safie intended by his will." Carlos claims his father's intent was a "moot" issue. *Respondent's Brief, pg 4, fn. 3.* Yet, a cornerstone of Florida Probate law holds that the Decedent's intent is of paramount importance. *See*, *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985); *Westcoast Hospital Assoc. v. Florida National Bank of Jacksonville*, 100 So. 2d 807 (Fla. 1958); *Vetrick v. Keating*, 877 So. 2d 54 (Fla. 4th DCA 2004); *First National Bank of Florida v. Moffett*, 479 So. 2d 312, 315 (Fla. 5th DCA 1985) ("in construing wills and trusts, the intent of the testator ... should prevail and effect given to his wishes"). No vagaries exist. The Decedent was clear on his intended disposition for the preferred shares.

Even the authority cited in the Third District's PCA describes the importance of the decedent's intent as the "polestar by which courts must be guided." *Euart v. Yoakley*, 456 So. 2d 1327, 1329 (Fla. 4th DCA 1984). Respondent relegates the importance of his father's testamentary intent to a footnote buried in the middle of his brief. If this Honorable Court finds the Decedent's intent controls, Carlos loses control of Executive National Bank.

B. If Adopted, the Modern Trend Best Protects the Decedent's Right to Devise Property

This appeal is the first to suggest Florida should adopt the modern trend in clarification of *Euart* to resolve conflicting provisions between a Will and a Trust. As the Florida Supreme Court found, "perpetrating an error in legal thinking under the guise of *stare decisis* serves no one well and only undermines the integrity and credibility of the Court." *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995).

The modern trend of Trusts was promulgated to better effectuate the Decedent's intent. *See, In re: Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W. 117 (Neb. 2004); *In re: Syverson Trust*, 2003 WL 22016795 (Minn. App. 2003). Respondent dismissed this modern trend as a "red herring" because it has only been adopted by one state thus far. *Respondent's Brief, pg. 3.* In defense, this modern trend is highly specific to these unique facts. *Restatement (Third) of Trusts § 63* cmts. *h and i* (2003); Uniform Trust Code § 602 (c) (2001). More to the point, that is how Restatements and Uniform Codes are adopted – one state at a time.

Respondent does not deny the Decedent intended to dispose of his 1,357 preferred shares of Executive Banking Corporation stock by the 2001 Will. The Will is unambiguous. Moreover, the affidavit of the draftsman of both wills makes this plain. It is preposterous to describe this

affidavit as "a series of unproven allegations." The affidavit is a voluntary statement, made under oath, by a member of the Florida Bar and an Officer of the Court. It asserts facts derived from the Decedent's face-to-face conversations with his estate planning attorney who prepared the 1999 Will which replaced the Trust. This is the same attorney who prepared the 2001 Will to replace the disfavored estate plan expressed in both earlier testamentary documents.

Uncontroverted facts set forth in an affidavit are taken as true for summary judgment purposes. See, *V. P. Clarence Co. v. Colgate*, 115 N.M. 471, 473, 853 P. 2d 722, 724 (N.M. 1993); *Zafft v. Eli Lilly and Co.*, 676 S.W. 2d 241, 243 (MO 1984); *Farrell v. Theriault*, 464 A. 2d 188, 194 (ME 1983). Through this affidavit, the Decedent "speaks" to declare the 2001 Will was intended to prevent the exact result reached by the lower Florida courts.

Petitioner respectfully prays this Honorable Court accepts jurisdiction to review this injustice of constitutional proportion. The intent of the Testator must ultimately prevail for the right to devise property to have consequence. Where that intent is proven but not adjudicated by the Courts, the Due Process protections of the Fourteenth Amendment are offended.

## II. THE DECEDENT WAS DENIED A PROTECTED PROPERTY RIGHT WITHOUT DUE PROCESS

This Honorable Court has the authority to determine whether an appellate system unique to Florida has deprived the Decedent of his protected property rights without due process of law. *Missouri v. Lewis*, 101 U.S. 22, 30-31 (1879). On too many occasions, this Court and others have been called upon to correct errors of a Florida District Court which refused to write an opinion. *See*, Steven Krosschell, *DCAs, PCAs and Government in the Darkness*, 1 Fla. Coastal L. J. 13, 31-44 (Spring/ Summer 1999); *Florida v. Rodriguez*, 469

U.S. 1, 105 S.Ct. 308 (U.S. 1984) (reversing a citation PCA that misapprehended controlling principals of law). This responsibility properly belongs to the Florida Supreme Court.

### A. Due Process Must Prevail Over the Finality Of A District Court Decision

"District Courts in Florida have been directed in no uncertain terms to leave all judicial changes in the law to the Supreme Court of Florida." *Reichhold Chemicals, Inc. v. Omni-Vest, Inc.*, 352 So. 2d 58, 59 (Fla. 1st DCA 1977); *See also, Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980) ("only the United States Supreme Court and the Florida Supreme Court are an eligible source of law change"). This is not a concept unique to Florida.

The first court in the nation to consider the modern trend of Trusts was an intermediate appellate court from Minnesota. *In re: Syverson Trust*, 2003 WL 22016795 (Minn. App. 2003). This intermediate Court found that "adopting the proposed Restatement (Third) position would change the existing law ... [which] is the role of the supreme court or the legislature, not this court." *Id.* at *4. Had the Third District written an opinion as deferential, this appeal might not be before this Court as the Florida Supreme Court would have jurisdiction to act.

Former Florida Chief Justice Harry Lee Anstead distinguished the jurisdiction of the Florida Supreme Court as "perhaps the most limited of any state high court in the nation." *Bunkley v. State*, 882 So. 2d 890, 918 (in dissent) (Fla. 2004). Merely by refusing to write an opinion, a District Court denies the Florida Supreme Court jurisdiction to review its decision or promulgate new law on questions of first impression. Yet, Justice Anstead recognized "the dictates of due process of law take precedence over the legitimate interest in the finality of district court decisions." *Id.* at. 925.

Respondent's insistence that a District Court's decision was always intended to be final is both misplaced and outdated. *Respondent's Brief, pg. 7-8, citing Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958). *Ansin* was decided decades before the Florida constitution was amended to limit the Supreme Court's jurisdiction. Less than a decade after *Ansin*, Florida Supreme Court Justice Thornal wrote in his dissent: "I would never again accept with finality a decision of a District Court." *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 234 (Fla. 1965).

B. Article V §3(b)(3) Denies the Supreme Court the Right to Decide the Law of Florida

Justice Anstead noted the Florida Supreme Court is empowered "to authoritatively state the law when ... constitutional issues are at stake."[1] *Bunkley*, 882 So. 2d at 924. In her concurring opinion, Florida Supreme Court Justice Linda Ann Wells acknowledged the admonition of Third District Court Judge Gerald G. Cope, Jr., that, under Article V, §3(b)(3), the Florida Supreme Court lacks jurisdiction to review questions of first impression. *Id.* at 904, Fn. 14.

Currently, under Article V, §3(b)(3), a panel of three District Court judges may exceed their primary function of error-correction and decide whether to allow the Supreme Court "to discharge its judicial policy-making function of clarifying the law and promulgating new rules of law." *Bunkley*, 882 So. 2d at 924, *citing Whipple v. State*, 431 So. 2d 1011, 1014 (Fla. 2nd DCA 1983). Justice Anstead

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[1] The right to devise property is protected by the Florida constitution. *Shriner's Hospitals for Crippled Children v. Zrillic*, 562 So.2d 64, 67 (Fla. 1990).

forewarned "the availability and prevalence of the PCA[2] means that a district court could issue an opinion ... and then affirm all other appeals raising that issue through a PCA." *Bunkley*, 882 So. 2d at 925.

Justice Anstead's Due Process concerns are realized in this Appeal. The Third District issued its citation PCA on the authority of another case of first impression decided under materially different facts by the Fourth District. As such, the Florida Supreme Court lacked jurisdiction, even *all writs* jurisdiction, to decide whether the Third District ignored issues of law or misapplied the cited authorities. *See, Safie v. Safie*, 2005 WL 779576 (Fla. 2005), *citing, Persaud v. State*, 838 So. 2d 529, 533 (Fla. 2003). By declining to write an opinion, the Third District denied the Florida Supreme Court its right to review the modern trend of Trusts or the merger doctrine and to pronounce the law of Florida.

### C. The Decedent Was Denied Due Process Of Law by an Improvident Citation PCA

#### 1. The Applicability Of the Merger Doctrine Alone Warranted A Written Opinion

This Appeal presents a myriad of questions of first impression and constitutional importance which cannot be resolved by PCA with citations to *Euart v. Yoakley*, (456 So. 2d 1327 (Fla. 4th DCA 1984)) and *Macfarlane v. First National Bank of Miami*, 203 So. 2d 57 (Fla. 3rd DCA 1967).

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[2] In one year alone, the Florida Supreme Court lacked jurisdiction to review over 75% of all criminal appeals due to PCAs and citation PCAs. *Bunkley*, 882 So. 2d at 925, *citing* Judicial Management Council, *Final Report and Recommendations, Committee for Per Curian Affirmed Decisions*, Appendix D-6 (May 2000) (www.flcourts.org/sct/sctdocs/bin/pca-report.pdf).

A prime example is Respondent's brazen argument that twenty-five years ago "the so-called merger doctrine" was superceded by Florida Statute §689.075. *Respondent's Brief, pg. 4.* Respectfully, Respondent does not understand the merger doctrine which explains why recent precedent refutes his claim. In 1999, a United States Bankruptcy Judge held, "the Merger Doctrine has been applied by Florida Courts since at least 1921." *In re: Saber*, 233 B.R. 547, 554 fn. 5, (Bankr. S.D. Fla. 1999); *See also, In re: Wells*, 259 B.R. 776, 779 (Bankr. M.D. Fla. 2001); *Contella v. Contella*, 559 So. 2d 1217, 1218-9, (Fla. 5th DCA 1990); *See generally*, 55A Fla. Jur. 2nd Trusts §28 and §53 (2004).

Absent any discussion of the point in the opinions, neither *Euart* or *Macfarlane* could aspire to be controlling authority on the merger doctrine. As the Decedent acted as both Settlor and sole Trustee, the Trust terminated by operation of law when he claimed sole ownership of the Trust res. *Harvest v. Craft Construction Corp.*, 187 So.2d 72, 74 (Fla. 3d DCA 1966). The merger doctrine terminates the Trust, irrespective of its revocation provisions, once its continued existence is denied by the Settlor and sole Trustee. The Third District denied the Decedent due process in declining to write an opinion to resolve the conflicting positions on this dispositive issue.

2. It Falls To This Court To Correct The Third District's Misapplication Of Law

A District Court misapplies the law "by relying on a decision which involves a factual situation materially at variance with the one under review." *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520, 522 (Fla. 1980); *Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986). The Third District misapplied the law as none of the salient facts presented in this appeal were addressed by *Euart* or *Macfarlane*.

Here, the decedent proclaimed personal ownership of the preferred shares in two later Wills. He told his accountant the Trust terminated by its terms in 1999. He prepared the 1999 Will to devise a majority of the shares to Carlos as the Trust had provided. He told his attorneys, a senior Bank officer, and the Federal Reserve Bank which regulates Executive Banking Corporation that he owned the preferred shares personally. After Federal Regulators punished the Bank for Carlos' mismanagement, the Decedent prepared the 2001 Will with the firm belief the Trust was no longer viable.

This is the first Florida case where a decedent, acting as both Settlor and Trustee, devised the Trust res by two later Wills. Both lower Florida courts entirely ignored the merger doctrine and the modern trend which the Florida Supreme Court lacked jurisdiction to address. Perhaps the Florida Supreme Court would not consider this a "waste" of its time as Respondent suggests the Third District so determined. *Respondent's Brief, pg. 4.*

### D. The Court's Intervention is Required To Correct The Due Process Violation Caused by Florida's Appellate Procedure

Florida's appellate procedure is constitutionally unsound because it permits review by the United States Supreme Court while depriving the Florida Supreme Court jurisdiction to review the same matter. *Cope*, 45 Fla. L. Rev. at 80. As this infirmity is now written into the Florida Constitution, the errors are for this Court to correct.

Respondent cites no authority which holds Fla. R. App. P. 9.330(a) "gives litigants more process than they are entitled." *Respondent's Brief, pg. 10.* Former Chief Justice England concluded Rule 9.330(a) is flawed on several levels, all of which fail to "ameliorate the consequences" of allowing the District Courts to render decisions without explanation.

Arthur J. England, Jr., *Asking For a Written Opinion From a Court That Has Chosen Not To Write One*,78-Mar Fla. B.J. 10 (March 2004).

If this Honorable Court declines to intercede in this Appeal, it will certainly be called upon to act again in the near future. Florida's District Courts continue to improperly utilize the PCA to dispose of cases without explanation where one is clearly warranted.[3] Moreover, the intermediate appellate courts have little concern for review by a higher court if one District Court judge is speaking for the majority, when he declares: "we can run and we can hide." Steven A. Been, *Letters*, 78-May Fla. B. J. 4 (2004).

This Court can fashion a remedy that comports with Due Process without radically changing Florida's appellate system. The Florida Supreme Court must review questions of importance or first impression, even without the permission of the Third District Court of Appeal. Should this Honorable Court determine the United States Constitution protects the right to devise property, the Decedent was denied that right without Due Process under the present appellate procedure established under Florida law.

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[3] In *Bunkley*, Justice Anstead identified three issues properly raised on appeal which the Second District ignored in refusing to write an opinion. *Bunkley*, 882 So. 2d at 925.

## CONCLUSION

Petitioner believes that the Decedent's obvious testamentary intent was not followed. Respectfully, this Honorable Court should find this deprived the Decedent of his protected property right to dispose of the 1,357 preferred shares as he saw fit. The arbitrary result reached by the lower Florida courts offends due process which warrants the acceptance of jurisdiction and an Order that the parties brief their respective arguments.

Petitioner so prays.

Respectfully submitted,
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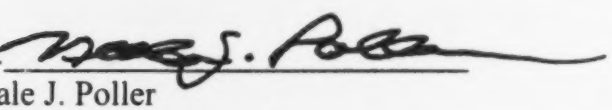
By: 
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